CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 35 APRIL 18, 2001 NO. 16

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 01–28)

TUNA FISH – TARIFF-RATE QUOTA

THE TARIFF-RATE QUOTA FOR CALENDAR YEAR 2001, ON TUNA CLASSIFIABLE UNDER SUBHEADING 1604.14.20, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (HTSUS)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna fish for calendar year 2001.

SUMMARY: Each year, the tariff-rate quota for tuna fish described in subheading 1604.14.20, HTSUS, is based on canned tuna production by the United States for the preceding calendar year. This document sets forth the quota for calendar year 2001.

EFFECTIVE DATES: The calendar year 2001 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1, through December 31, 2001.

FOR FURTHER INFORMATION CONTACT: Constance Chancey, Chief, Quota/Visa Branch, Trade Programs, Office of Field Operations, U.S. Customs Service, Washington, D.C. 20229, (202) 927-5399.

BACKGROUND:

It has been determined that 29,553,863 kilograms of tuna may be entered or withdrawn from warehouse for consumption during the calendar year 2001, at the rate of 6 percent *ad valorem* under subheading 1604.14.20, HTSUS. Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent *ad valorem* under subheading 1604.14.30 HTSUS.

Dated: March 30, 2001.

CHARLES W. WINWOOD,
Acting Commissioner.

(T.D. 01–29)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR MARCH 2001

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision *** for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of United States, conversion shall be at the following rates:

Holiday(s): None.

Australia dollar:

March 1, 2001	$0.526200
March 2, 2001	.529200
March 3, 2001	.529200
March 4, 2001	.529200
March 5, 2001	.521800
March 6, 2001	.517000
March 7, 2001	.509000
March 8, 2001	.508900
March 9, 2001	.508500
March 10, 2001	.508500
March 11, 2001	.508500
March 12, 2001	.509600
March 13, 2001	.503100
March 14, 2001	.498100
March 15, 2001	.494400
March 16, 2001	.494000
March 17, 2001	.494000
March 18, 2001	.494000
March 19, 2001	.498400
March 20, 2001	.499700
March 21, 2001	.493600
March 22, 2001	.491300
March 23, 2001	.496300
March 24, 2001	.496300
March 25, 2001	.496300
March 26, 2001	.499000
March 27, 2001	.496300
March 28, 2001	.493600
March 29, 2001	.492100
March 30, 2001	.488100
March 31, 2001	.488100

FOREIGN CURRENCIES—Variances from quarterly rates for March 2001 (continued):

Brazil real:

March 1, 2001	$0.489476
March 7, 2001	.488520
March 8, 2001	.489476
March 9, 2001	.486145
March 10, 2001	.486145
March 11, 2001	.486145
March 12, 2001	.484262
March 13, 2001	.484966
March 14, 2001	.481928
March 15, 2001	.475624
March 16, 2001	.469704
March 17, 2001	.469704
March 18, 2001	.469704
March 19, 2001	.460617
March 20, 2001	.476190
March 21, 2001	.474608
March 22, 2001	.465983
March 23, 2001	.460405
March 24, 2001	.460405
March 25, 2001	.460405
March 26, 2001	.468165
March 27, 2001	.470810
March 28, 2001	.470588
March 29, 2001	.466636
March 30, 2001	.459770
March 31, 2001	.459770

Canada dollar:

March 21, 2001	$0.635728
March 22, 2001	.635243
March 29, 2001	.635930
March 30, 2001	.633553
March 31, 2001	.633553

Denmark krone:

March 16, 2001	$0.119474
March 17, 2001	.119474
March 18, 2001	.119474
March 19, 2001	.120446
March 21, 2001	.120228
March 22, 2001	.118941
March 23, 2001	.119574
March 24, 2001	.119574
March 25, 2001	.119574
March 26, 2001	.119941
March 27, 2001	.119389
March 28, 2001	.118977
March 29, 2001	.117980
March 30, 2001	.117820
March 31, 2001	.117820

FOREIGN CURRENCIES—Variances from quarterly rates for March 2001 (continued):

Japan yen:

March 12, 2001	$0.008290
March 14, 2001	.008267
March 15, 2001	.008181
March 16, 2001	.008140
March 17, 2001	.008140
March 18, 2001	.008140
March 19, 2001	.008159
March 20, 2001	.008148
March 21, 2001	.008089
March 22, 2001	.008075
March 23, 2001	.008154
March 24, 2001	.008154
March 25, 2001	.008154
March 26, 2001	.008143
March 27, 2001	.008131
March 28, 2001	.008155
March 29, 2001	.008100
March 30, 2001	.007966
March 31, 2001	.007966

New Zealand dollar:

March 8, 2001	$0.421000
March 9, 2001	.419500
March 10, 2001	.419500
March 11, 2001	.419500
March 12, 2001	.420400
March 13, 2001	.415700
March 14, 2001	.416200
March 15, 2001	.411900
March 16, 2001	.413500
March 17, 2001	.413500
March 18, 2001	.413500
March 19, 2001	.418000
March 20, 2001	.418200
March 21, 2001	.414500
March 22, 2001	.413700
March 23, 2001	.416700
March 24, 2001	.416700
March 25, 2001	.416700
March 26, 2001	.414500
March 27, 2001	.411000
March 28, 2001	.409300
March 29, 2001	.406500
March 30, 2001	.403300
March 31, 2001	.403300

South Africa rand:

March 16, 2001	$0.125826
March 17, 2001	.125826
March 18, 2001	.125826

FOREIGN CURRENCIES—Variances from quarterly rates for March 2001 (continued):

South Africa rand (continued):

March 19, 2001	$0.125000
March 20, 2001	.125353
March 21, 2001	.125078
March 22, 2001	.124533
March 23, 2001	.125471
March 24, 2001	.125471
March 25, 2001	.125471
March 26, 2001	.125755
March 27, 2001	.124953
March 28, 2001	.124844
March 29, 2001	.124844
March 30, 2001	.124417
March 31, 2001	.124417

Sri Lanka rupee:

March 1, 2001	$0.011494
March 2, 2001	.011494
March 3, 2001	.011494
March 4, 2001	.011494
March 5, 2001	.011494

Sweden krona:

March 13, 2001	$0.099865
March 14, 2001	.099899
March 15, 2001	.099030
March 16, 2001	.097570
March 17, 2001	.097570
March 18, 2001	.097570
March 19, 2001	.098087
March 20, 2001	.098756
March 21, 2001	.097523
March 22, 2001	.095877
March 23, 2001	.097532
March 24, 2001	.097532
March 25, 2001	.097532
March 26, 2001	.097828
March 27, 2001	.097685
March 28, 2001	.096702
March 29, 2001	.096085
March 30, 2001	.096339
March 31, 2001	.096339

Switzerland franc:

March 15, 2001	$0.588166
March 16, 2001	.582751
March 17, 2001	.582751
March 18, 2001	.582751
March 19, 2001	.585892
March 20, 2001	.589727

FOREIGN CURRENCIES—Variances from quarterly rates for March 2001 (continued):

Switzerland franc (continued):

March 21, 2001	$0.585309
March 22, 2001	.580282
March 23, 2001	.582920
March 24, 2001	.582920
March 25, 2001	.582920
March 26, 2001	.582920
March 27, 2001	.581463
March 28, 2001	.579878
March 29, 2001	.577267
March 30, 2001	.576037
March 31, 2001	.576037

United Kingdom pound sterling:

March 22, 2001	$1.422300
March 30, 2001	1.419000
March 31, 2001	1.419000

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 01–30)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR MARCH 2001

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and other concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CRF 159, Subpart C).

Holiday(s): None.

Austria schilling:

March 1, 2001	$0.067520
March 2, 2001	.067876
March 3, 2001	.067876
March 4, 2001	.067876

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

Austria schilling (continued):

March 5, 2001	$0.067506
March 6, 2001	.067680
March 7, 2001	.067397
March 8, 2001	.067448
March 9, 2001	.067695
March 10, 2001	.067695
March 11, 2001	.067695
March 12, 2001	.067586
March 13, 2001	.066481
March 14, 2001	.066372
March 15, 2001	.065740
March 16, 2001	.064890
March 17, 2001	.064890
March 18, 2001	.064890
March 19, 2001	.065297
March 20, 2001	.065798
March 21, 2001	.065188
March 22, 2001	.064541
March 23, 2001	.064868
March 24, 2001	.064868
March 25, 2001	.064868
March 26, 2001	.065079
March 27, 2001	.064751
March 28, 2001	.064548
March 29, 2001	.064003
March 30, 2001	.063908
March 31, 2001	.063908

Belgium franc:

March 1, 2001	$0.023032
March 2, 2001	.023153
March 3, 2001	.023153
March 4, 2001	.023153
March 5, 2001	.023027
March 6, 2001	.023086
March 7, 2001	.022990
March 8, 2001	.023007
March 9, 2001	.023091
March 10, 2001	.023091
March 11, 2001	.023091
March 12, 2001	.023054
March 13, 2001	.022677
March 14, 2001	.022640
March 15, 2001	.022424
March 16, 2001	.022134
March 17, 2001	.022134
March 18, 2001	.022134
March 19, 2001	.022273
March 20, 2001	.022444
March 21, 2001	.022236

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

Belgium franc (continued):

March 22, 2001	$0.022015
March 23, 2001	.022127
March 24, 2001	.022127
March 25, 2001	.022127
March 26, 2001	.022199
March 27, 2001	.022087
March 28, 2001	.022018
March 29, 2001	.021832
March 30, 2001	.021800
March 31, 2001	.021800

Finland markka:

March 1, 2001	$0.156263
March 2, 2001	.157088
March 3, 2001	.157088
March 4, 2001	.157088
March 5, 2001	.156230
March 6, 2001	.156633
March 7, 2001	.155977
March 8, 2001	.156095
March 9, 2001	.156667
March 10, 2001	.156667
March 11, 2001	.156667
March 12, 2001	.156415
March 13, 2001	.153858
March 14, 2001	.153606
March 15, 2001	.152143
March 16, 2001	.150175
March 17, 2001	.150175
March 18, 2001	.150175
March 19, 2001	.151117
March 20, 2001	.152277
March 21, 2001	.150865
March 22, 2001	.149368
March 23, 2001	.150125
March 24, 2001	.150125
March 25, 2001	.150125
March 26, 2001	.150612
March 27, 2001	.149855
March 28, 2001	.149385
March 29, 2001	.148123
March 30, 2001	.147904
March 31, 2001	.147904

France franc:

March 1, 2001	$0.141640
March 2, 2001	.142387
March 3, 2001	.142387
March 4, 2001	.142387

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

France franc (continued):

March 5, 2001	$0.141610
March 6, 2001	.141976
March 7, 2001	.141381
March 8, 2001	.141488
March 9, 2001	.142006
March 10, 2001	.142006
March 11, 2001	.142006
March 12, 2001	.141778
March 13, 2001	.139460
March 14, 2001	.139232
March 15, 2001	.137905
March 16, 2001	.136122
March 17, 2001	.136122
March 18, 2001	.136122
March 19, 2001	.136975
March 20, 2001	.138027
March 21, 2001	.136747
March 22, 2001	.135390
March 23, 2001	.136076
March 24, 2001	.136076
March 25, 2001	.136076
March 26, 2001	.136518
March 27, 2001	.135832
March 28, 2001	.135405
March 29, 2001	.134262
March 30, 2001	.134064
March 31, 2001	.134064

Germany deutsche mark:

March 1, 2001	$0.475041
March 2, 2001	.477547
March 3, 2001	.477547
March 4, 2001	.477547
March 5, 2001	.474939
March 6, 2001	.476166
March 7, 2001	.474172
March 8, 2001	.474530
March 9, 2001	.476268
March 10, 2001	.476268
March 11, 2001	.476268
March 12, 2001	.475501
March 13, 2001	.467730
March 14, 2001	.466963
March 15, 2001	.462515
March 16, 2001	.456533
March 17, 2001	.456533
March 18, 2001	.456533
March 19, 2001	.459396
March 20, 2001	.462924
March 21, 2001	.458629

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

Germany deutsche mark (continued):

March 22, 2001	$0.454078
March 23, 2001	.456379
March 24, 2001	.456379
March 25, 2001	.456379
March 26, 2001	.457862
March 27, 2001	.455561
March 28, 2001	.454129
March 29, 2001	.450295
March 30, 2001	.449630
March 31, 2001	.449630

Greece drachma:

March 1, 2001	$0.002727
March 2, 2001	.002741
March 3, 2001	.002741
March 4, 2001	.002741
March 5, 2001	.002726
March 6, 2001	.002733
March 7, 2001	.002722
March 8, 2001	.002724
March 9, 2001	.002734
March 10, 2001	.002734
March 11, 2001	.002734
March 12, 2001	.002729
March 13, 2001	.002685
March 14, 2001	.002680
March 15, 2001	.002655
March 16, 2001	.002620
March 17, 2001	.002620
March 18, 2001	.002620
March 19, 2001	.002637
March 20, 2001	.002657
March 21, 2001	.002632
March 22, 2001	.002606
March 23, 2001	.002620
March 24, 2001	.002620
March 25, 2001	.002620
March 26, 2001	.002628
March 27, 2001	.002615
March 28, 2001	.002607
March 29, 2001	.002585
March 30, 2001	.002581
March 31, 2001	.002581

Ireland pound:

March 1, 2001	$1.179714
March 2, 2001	1.185935
March 3, 2001	1.185935
March 4, 2001	1.185935

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

Ireland pound (continued):

March 5, 2001	$1.179460
March 6, 2001	1.182507
March 7, 2001	1.177555
March 8, 2001	1.178444
March 9, 2001	1.182761
March 10, 2001	1.182761
March 11, 2001	1.182761
March 12, 2001	1.180856
March 13, 2001	1.161556
March 14, 2001	1.159652
March 15, 2001	1.148605
March 16, 2001	1.133749
March 17, 2001	1.133749
March 18, 2001	1.133749
March 19, 2001	1.140860
March 20, 2001	1.149621
March 21, 2001	1.138955
March 22, 2001	1.127654
March 23, 2001	1.133368
March 24, 2001	1.133368
March 25, 2001	1.133368
March 26, 2001	1.137050
March 27, 2001	1.131337
March 28, 2001	1.127781
March 29, 2001	1.118258
March 30, 2001	1.116608
March 31, 2001	1.116608

Italy lira:

March 1, 2001	$0.000480
March 2, 2001	.000482
March 3, 2001	.000482
March 4, 2001	.000482
March 5, 2001	.000480
March 6, 2001	.000481
March 7, 2001	.000479
March 8, 2001	.000479
March 9, 2001	.000481
March 10, 2001	.000481
March 11, 2001	.000481
March 12, 2001	.000480
March 13, 2001	.000472
March 14, 2001	.000472
March 15, 2001	.000467
March 16, 2001	.000461
March 17, 2001	.000461
March 18, 2001	.000461
March 19, 2001	.000464
March 20, 2001	.000468
March 21, 2001	.000463

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

Italy lira (continued):

March 22, 2001	$0.000459
March 23, 2001	.000461
March 24, 2001	.000461
March 25, 2001	.000461
March 26, 2001	.000462
March 27, 2001	.000460
March 28, 2001	.000459
March 29, 2001	.000455
March 30, 2001	.000454
March 31, 2001	.000454

Luxembourg franc:

March 1, 2001	$0.023032
March 2, 2001	.023153
March 3, 2001	.023153
March 4, 2001	.023153
March 5, 2001	.023027
March 6, 2001	.023086
March 7, 2001	.022990
March 8, 2001	.023007
March 9, 2001	.023091
March 10, 2001	.023091
March 11, 2001	.023091
March 12, 2001	.023054
March 13, 2001	.022677
March 14, 2001	.022640
March 15, 2001	.022424
March 16, 2001	.022134
March 17, 2001	.022134
March 18, 2001	.022134
March 19, 2001	.022273
March 20, 2001	.022444
March 21, 2001	.022236
March 22, 2001	.022015
March 23, 2001	.022127
March 24, 2001	.022127
March 25, 2001	.022127
March 26, 2001	.022199
March 27, 2001	.022087
March 28, 2001	.022018
March 29, 2001	.021832
March 30, 2001	.021800
March 31, 2001	.021800

Netherlands guilder:

March 1, 2001	$0.421607
March 2, 2001	.423831
March 3, 2001	.423831
March 4, 2001	.423831

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

Netherlands guilder (continued):

March 5, 2001	$0.421516
March 6, 2001	.422606
March 7, 2001	.420836
March 8, 2001	.421153
March 9, 2001	.422696
March 10, 2001	.422696
March 11, 2001	.422696
March 12, 2001	.422016
March 13, 2001	.415118
March 14, 2001	.414437
March 15, 2001	.410490
March 16, 2001	.405180
March 17, 2001	.405180
March 18, 2001	.405180
March 19, 2001	.407722
March 20, 2001	.410853
March 21, 2001	.407041
March 22, 2001	.403002
March 23, 2001	.405044
March 24, 2001	.405044
March 25, 2001	.405044
March 26, 2001	.406360
March 27, 2001	.404318
March 28, 2001	.403048
March 29, 2001	.399644
March 30, 2001	.399054
March 31, 2001	.399054

Portugal escudo:

March 1, 2001	$0.004634
March 2, 2001	.004659
March 3, 2001	.004659
March 4, 2001	.004659
March 5, 2001	.004633
March 6, 2001	.004645
March 7, 2001	.004626
March 8, 2001	.004629
March 9, 2001	.004646
March 10, 2001	.004646
March 11, 2001	.004646
March 12, 2001	.004639
March 13, 2001	.004563
March 14, 2001	.004556
March 15, 2001	.004512
March 16, 2001	.004454
March 17, 2001	.004454
March 18, 2001	.004454
March 19, 2001	.004482
March 20, 2001	.004516
March 21, 2001	.004474

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

Portugal escudo (continued):

March 22, 2001	$0.004430
March 23, 2001	.004452
March 24, 2001	.004452
March 25, 2001	.004452
March 26, 2001	.004467
March 27, 2001	.004444
March 28, 2001	.004430
March 29, 2001	.004393
March 30, 2001	.004386
March 31, 2001	.004386

South Korea won:

March 1, 2001	$0.000798
March 2, 2001	.000789
March 3, 2001	.000789
March 4, 2001	.000789
March 5, 2001	.000784
March 6, 2001	.000790
March 7, 2001	.000785
March 8, 2001	.000786
March 9, 2001	.000788
March 10, 2001	.000788
March 11, 2001	.000788
March 12, 2001	.000781
March 13, 2001	.000784
March 14, 2001	.000782
March 15, 2001	.000778
March 16, 2001	.000772
March 17, 2001	.000772
March 18, 2001	.000772
March 19, 2001	.000770
March 20, 2001	.000771
March 21, 2001	.000763
March 22, 2001	.000755
March 23, 2001	.000763
March 24, 2001	.000763
March 25, 2001	.000763
March 26, 2001	.000763
March 27, 2001	.000762
March 28, 2001	.000768
March 29, 2001	.000756
March 30, 2001	.000751
March 31, 2001	.000751

Spain peseta:

March 1, 2001	$0.005584
March 2, 2001	.005613
March 3, 2001	.005613
March 4, 2001	.005613

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

Spain peseta (continued):

March 5, 2001	$0.005583
March 6, 2001	.005597
March 7, 2001	.005574
March 8, 2001	.005578
March 9, 2001	.005598
March 10, 2001	.005598
March 11, 2001	.005598
March 12, 2001	.005589
March 13, 2001	.005498
March 14, 2001	.005489
March 15, 2001	.005437
March 16, 2001	.005366
March 17, 2001	.005366
March 18, 2001	.005366
March 19, 2001	.005400
March 20, 2001	.005442
March 21, 2001	.005391
March 22, 2001	.005338
March 23, 2001	.005365
March 24, 2001	.005365
March 25, 2001	.005365
March 26, 2001	.005382
March 27, 2001	.005355
March 28, 2001	.005338
March 29, 2001	.005293
March 30, 2001	.005285
March 31, 2001	.005285

Taiwan N.T. dollar:

March 1, 2001	$0.030883
March 2, 2001	.030864
March 3, 2001	.030864
March 4, 2001	.030864
March 5, 2001	.030864
March 6, 2001	.030864
March 7, 2001	.030845
March 8, 2001	.030845
March 9, 2001	.030817
March 10, 2001	.030817
March 11, 2001	.030817
March 12, 2001	.030788
March 13, 2001	.030703
March 14, 2001	.030741
March 15, 2001	.030665
March 16, 2001	.030553
March 17, 2001	.030553
March 18, 2001	.030553
March 19, 2001	.030488
March 20, 2001	.030502
March 21, 2001	.030469

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 2001 (continued):

Taiwan N.T. dollar (continued):

March 22, 2001	$0.030377
March 23, 2001	.030441
March 24, 2001	.030441
March 25, 2001	.030441
March 26, 2001	.030562
March 27, 2001	.030609
March 28, 2001	.030609
March 29, 2001	.030488
March 30, 2001	.030441
March 31, 2001	.030441

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 01–31)

FOREIGN CURRENCIES

CERTIFIED RATES OF FOREIGN EXCHANGE: SECOND QUARTER, 2001

Listed below are the buying rates certified for the quarter to the Secretary of the Treasury by the Federal Reserve Bank of New York under provision of 31 U.S.C. 5151. These quarterly rates are applicable throughout the quarter except when the certified daily rates vary by 5% or more. Such daily variances are published by the CIE on a weekly basis.

QUARTER BEGINNING: APRIL 1, 2001 AND ENDING JUNE 30, 2001

COUNTRY	CURRENCY	U.S. DOLLARS
Australia	Dollar	$0.482800
Brazil	Real	0.463392
Canada	Dollar	0.634921
China, P.R.	Yuan	0.120808
Denmark	Krone	0.118245
Hong Kong	Dollar	0.128233
India	Rupee	0.021436
Iran	Rial	N/A
Israel	New Sheqel	N/A
Japan	Yen	0.007890
Malaysia	Ringgit	0.263158
Mexico	New Peso	0.106225
New Zealand	Dollar	0.399300
Norway	Krone	0.109158
Philippines	Peso	N/A
Singapore	Dollar	0.550752
South Africa	Rand	0.123305
Sri Lanka	Rupee	0.011547
Sweden	Krona	0.096293
Switzerland	Franc	0.577467
Thailand	Baht	0.022143
United Kingdom	Pound Sterling	1.420000
Venezuela	Bolivar	0.001412

Dated: April 2, 2001.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 3–2001)

AGENCY: U.S. Customs Service, Department of the Treasury

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of February 2001. The last notice was published in the CUSTOMS BULLETIN on February 28, 2001.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building -3rd floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief Intellectual Property Rights Branch, (202) 927-2330.

Dated: April 2, 2001.

JOANNE ROMAN STUMP
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0100008	20010208	20210208	ZENWORKS 2.0	NOVELL, INC.	N
COP0100009	20010209	20210209	POWER RANGER TIME FORE	SABAN ENTERTAINMENT INC.	N
COP0100010	20010212	20210212	Y II K	IN TAIK LIM	N
COP0100011	20010220	20210220	THE POWER OF ONE	NINTENDO OF AMERICA INC.	N
COP0100012	20010220	20210220	REVELATION LUGIA	NINTENDO OF AMERICA INC.	N
COP0100013	20010220	20210220	TAE BO LIVE - BASIC VOLUME 9	N.C.P. MARKETING GROUP, INC.	N
COP0100014	20010220	20210220	WAVELET BRACELET	SUKEN S. MEHTA	N
COP0100015	20010220	20210220	WAVELET BRACELET	SUKEN S. MEHTA	N
COP0100016	20010221	20210221	FREDDY THE SINGING & TALKING FROG	MASTER TOYS & NOVELTIES INC.	N
COP0100017	20010221	20210221	FUSSY BABY	MASTER TOYS & NOVELTIES INC.	N
SUBTOTAL RECORDATION TYPE			10		
TMK0100010	20010207	20090105	ONLY A SURFER KNOWS THE FEELING	GSM (OPERATIONS) PTY LTD.	N
TMK0100011	20010207	20041120	BILLABONG STYLIZED WAVE DESIGN	GSM (OPERATIONS) PTY LTD.	N
TMK0100012	20010207	20090511	BILLABONG AND WAVE DESIGN	GSM (OPERATIONS) PTY LTD.	N
TMK0100013	20010207	20090216	SURF TIME	GSM (OPERATIONS) PTY LTD.	N
TMK0100014	20010208	20071215	BILLABONG	GSM (OPERATIONS) PTY LTD.	N
TMK0100015	20010208	20040508	BILLABONG	GSM (OPERATIONS) PTY LTD.	N
TMK0100016	20010208	20071215	BILLABONG	DEMARIA ELECTROOPTICS SYSTEMS IN	N
TMK0100017	20010208	20090824	DEOS	DEMARIA ELECTROOPTICS SYSTEMS IN	N
TMK0100018	20010208	20090824	DEOS	WHEEL POWER INC.	N
TMK0100019	20010209	20100718	HAMANN AND DESIGN	SEAN PUFFY COMBS	N
TMK0100020	20010212	20101128	SEAN JOHN STYLIZED	AYURCORE INC.	N
TMK0100021	20010212	20100801	AYURCORE, INC. AND DESIGN	NOKIA CORPORATION	N
TMK0100022	20091212	20091212	NOKIA	NOKIA CORPORATION	N
TMK0100023	20010212	20021117	DESIGN MARK	NOKIA CORPORATION	N
TMK0100024	20010212	20080825	NOKIA-CONNECTING PEOPLE	THE PILLSBURY COMPANY	N
TMK0100025	20010213	20100307	SPROUT	THE PILLSBURY COMPANY	N
TMK0100026	20010213	20101024	SPROUT	THE PILLSBURY COMPANY	N
TMK0100027	20010213	20100228	SPROUT	THE PILLSBURY COMPANY	N
TMK0100028	20010213	20030828	DOUGHBOY	THE PILLSBURY COMPANY	N
TMK0100029	20010213	20070826	DOUGHBOY	GRAMET TWO CORP.	N
TMK0100030	20010213	20010908	HAAGEN-DAZS	GRAMET TWO CORP.	N
TMK0100031	20010213	20020803	HAAGEN-DAZS	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0100032	20010213	20040118	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0100033	20010213	20091227	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0100034	20010213	20061231	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0100035	20010213	20080105	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0100036	20010213	20071208	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0100037	20010213	20030713	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0100038	20010213	20060702	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0100039	20010213	20030306	CHRISTIAN DIOR	GOLD EAGLE CO.	N
TMK0100040	20010215	20080818	BOTTLE CONFIGURATION	CPI ADVANCED INC.	N
TMK0100041	20010215	20050328	ENABA	BATH & BODY WORKS, INC.	N
TMK0100042	20010220	20100912	SPREAD LOVE NOT GERMS	BATH & BODY WORKS, INC.	N
TMK0100043	20010220	20080630	FRAGRANT BOTANICALS		

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0100044	20010220	20100606	JOYFUL GARDENS	BATH & BODY WORKS, INC.	N
TMK0100045	20010220	20080407	SUMMIT FOR MEN	BATH & BODY WORKS, INC.	N
TMK0100046	20010220	20080804	MAY BOUQUET	BATH & BODY WORKS, INC.	N
TMK0100047	20010220	20060730	HEARTLAND BY GINGHAM	BATH & BODY WORKS, INC.	N
TMK0100048	20010220	20060423	SIMPLE GOODNESS	BATH & BODY WORKS, INC.	N
TMK0100049	20010221	20040927	EMC2	EMC CORPORATION	N
TMK0100050	20010221	20080310	EMC	EMC CORPORATION	N
TMK0100051	20010221	20021215	WEEKENDER	SPORTAILOR, INC.	N
TMK0100052	20010221	20070225	G.P.S.	SPORTAILOR, INC.	N
TMK0100053	20010221	20100919	LUAU	SPORTAILOR, INC.	N
TMK0100054	20010221	20091123	HOOK & TACKLE	SPORTAILOR, INC.	N
TMK0100055	20010221	20100919	HOOK & TACKLE	SPORTAILOR, INC.	N
TMK0100056	20010221	20050411	BOGARI	INLINE CAPITAL GROUP, INC.	N
TMK0100057	20010221	20090307	OSCARS	ACADEMY OF MOTION PICTURE ARTS &	N
TMK0100058	20010221	20080825	PACKAGING DESIGN	CONTESSA FOOD PRODUCTS, INC.	N
TMK0100059	20010221	20080127	PACKAGING DESIGN	CONTESSA FOOD PRODUCTS, INC.	N
TMK0100060	20010222	20041204	NEUSPEED	AUTOMOTIVE PERFORMANCE SYSTEMS	N

SUBTOTAL RECORDATION TYPE 51

TOTAL RECORDATIONS ADDED THIS MONTH 61

DATES AND DRAFT AGENDA OF THE TWENTY-SEVENTH SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs Service, Department of the Treasury, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the twenty-seventh session of the Harmonized System Committee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

DATE: April 18, 2001.

FOR FURTHER INFORMATION CONTACT: Myles B. Harmon, Director, International Agreements Staff, U.S. Customs Service (202-927-2255), or Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202-205-2592).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, form the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium. The next session of the HSC will be the twenty-seventh and it will be held from May 7–18, 2001.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the Department of the Treasury, represented by the U.S. Customs Service, the Department of

Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("IT"), jointly represent the U.S. government at the sessions of the HSC. The Customs Service representative serves as the head of the delegation at the sessions of the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either the Customs Service or the ITC. Comments on agenda items may be directed to the above-listed individuals.

Dated: April 3, 2001.

MYLES B. HARMON,
Director,
International Agreements Staff.

[Attachment]

WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES
Established in 1952 as the Customs Co-operation Council
Créée en 1952 sous le nom de Conseil de coopération douanière

HARMONIZED SYSTEM COMMITTEE
-
27th Session
-

NC0344E1

O. Eng.

H9-12

Brussels, 2001.

DRAFT AGENDA FOR THE 27th SESSION OF THE HARMONIZED SYSTEM COMMITTEE

From : Monday, 7 May 2001 (10 a.m.)
To : Friday, 19 May 2001
N.B. : Questions under Agenda Item VII will be examined first by the presessional Working Party (from Wednesday 2 to Friday 4 May 2001).

I. ADOPTION OF THE AGENDA

Draft Agenda NC0344E1

Draft Timetable NC0346B1

II. REPORT BY THE SECRETARIAT

1. Position regarding Contracting Parties to the HS Convention and related matters NC0347E1
2. Report on the meeting of the Policy Commission (44th Session)..... NC0348E1
3. Approval of decisions taken by the Harmonized System Committee at its 26th Session NC0349E1
4. Technical assistance activities of the Nomenclature and Classification Sub-Directorate NC0350E1
5. Co-operation with other international organisations NC0351E1
6. Co-operation with the Technical Committee on Rules of Origin NC0352E1

NC0344E1

NC0344E1

LIST OF FOREIGN ENTITIES VIOLATING TEXTILE TRANSSHIPMENT AND COUNTRY OF ORIGIN RULES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document notifies the public of foreign entities which have been issued a penalty claim under section 592 of the Tariff Act of 1930, for certain violations of the customs laws. This list is authorized to be published by section 333 of the Uruguay Round Agreements Act.

DATES: This document notifies the public of the semiannual list for the 6-month period starting March 31, 2001, and ending September 30, 2001.

FOR FURTHER INFORMATION CONTACT: For information regarding any of the operational aspects, contact Gregory Olsavsky, Fines, Penalties and Forfeitures Branch, Office of Field Operations, (202)927-3119. For information regarding any of the legal aspects, contact Willem A. Daman, Office of Chief Counsel, (202)927-6900.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 333 of the Uruguay Round Agreements Act(URAA)(Public Law 103–465, 108 Stat. 4809)(signed December 8, 1994), entitled Textile Transshipments, amended Part V of title IV of the Tariff Act of 1930 by creating a section 592A (19 U.S.C. 1592a), which authorizes the Secretary of the Treasury to publish in the **Federal Register**, on a semiannual basis, a list of the names of any producers, manufacturers, suppliers, sellers, exporters, or other persons located outside the Customs territory of the United States, when these entities and/or persons have been issued a penalty claim under section 592 of the Tariff Act, for certain violations of the customs laws, provided that certain conditions are satisfied.

The violations of the customs laws referred to above are the following: (1) Using documentation, or providing documentation subsequently used by the importer of record, which indicates a false or fraudulent country of origin or source of textile or apparel products; (2) Using counterfeit visas, licenses, permits, bills of lading, or similar documentation, or providing counterfeit visas, licenses, permits, bills of lading, or similar documentation that is subsequently used by the importer of record, with respect to the entry into the Customs territory of the United States of textile or apparel products; (3) Manufacturing, producing, supplying, or selling textile or apparel products which are falsely or fraudulently labeled as to country of origin or source; and (4) Engaging in practices which aid or abet the transship-

ment, through a country other than the country of origin, of textile or apparel products in a manner which conceals the true origin of the textile or apparel products or permits the evasion of quotas on, or voluntary restraint agreements with respect to, imports of textile or apparel products.

If a penalty claim has been issued with respect to any of the above violations, and no petition in response to the claim has been filed, the name of the party to whom the penalty claim was issued will appear on the list. If a petition or supplemental petition for relief from the penalty claim is submitted under 19 U.S.C. 1618, in accord with the time periods established by sections 171.2 and 171.61, Customs Regulations (19 CFR 171.2, 171.61) and the petition is subsequently denied or the penalty is mitigated, and no further petition, if allowed, is received within 60 days of the denial or allowance of mitigation, then the administrative action shall be deemed to be final and administrative remedies will be deemed to be exhausted. Consequently, the name of the party to whom the penalty claim was issued will appear on the list. However, provision is made for an appeal to the Secretary of the Treasury by the person named on the list, for the removal of its name from the list. If the Secretary finds that such person or entity has not committed any of the enumerated violations for a period of not less than 3 years after the date on which the person or entity's name was published, the name will be removed from the list as of the next publication of the list.

Reasonable Care Required

Section 592A also requires any importer of record entering, introducing, or attempting to introduce into the commerce of the United States textile or apparel products that were either directly or indirectly produced, manufactured, supplied, sold, exported, or transported by such named person to show, to the satisfaction of the Secretary, that such importer has exercised reasonable care to ensure that the textile or apparel products are accompanied by documentation, packaging, and labeling that are accurate as to its origin. Reliance solely upon information regarding the imported product from a person named on the list is clearly not the exercise of reasonable care. Thus, the textile and apparel importers who have some commercial relationship with one or more of the listed parties must exercise a degree of reasonable care in ensuring that the documentation covering the imported merchandise, as well as its packaging and labeling, is accurate as to the country of origin of the merchandise. This degree of reasonable care must involve reliance on more than information supplied by the named party.

In meeting the reasonable care standard when importing textile or apparel products and when dealing with a party named on the list published pursuant to section 592A of the Tariff Act of 1930, an importer should consider the following questions in attempting to ensure that the documentation, packaging, and labeling is accurate as

to the country of origin of the imported merchandise. The list of questions is not exhaustive but is illustrative.

1) Has the importer had a prior relationship with the named party?

2) Has the importer had any detentions and/or seizures of textile or apparel products that were directly or indirectly produced, supplied, or transported by the named party?

3) Has the importer visited the company's premises and ascertained that the company has the capacity to produce the merchandise?

4) Where a claim of an origin conferring process is made in accordance with 19 CFR 102.21, has the importer ascertained that the named party actually performed the required process?

5) Is the named party operating from the same country as is represented by that party on the documentation, packaging or labeling?

6) Have quotas for the imported merchandise closed or are they nearing closing from the main producer countries for this commodity?

7) What is the history of this country regarding this commodity?

8) Have you asked questions of your supplier regarding the origin of the product?

9) Where the importation is accompanied by a visa, permit, or license, has the importer verified with the supplier or manufacturer that the visa, permit, and/or license is both valid and accurate as to its origin? Has the importer scrutinized the visa, permit or license as to any irregularities that would call its authenticity into question?

The law authorizes a semiannual publication of the names of the foreign entities and/or persons. On October 18, 2000, Customs published a Notice in the **Federal Register** (65 FR 62409) which identified 24 (twenty-four) entities which fell within the purview of section 592A of the Tariff Act of 1930.

592A List

For the period ending March 30, 2001, Customs has identified 23 (twenty-three) foreign entities that fall within the purview of section 592A of the Tariff Act of 1930. This list reflects two new entities and three removals to the 24 entities named on the list published on October 18, 2000. The parties on the current list were assessed a penalty claim under 19 U.S.C. 1592, for one or more of the four above-described violations. The administrative penalty action was concluded against the parties by one of the actions noted above as having terminated the administrative process.

The names and addresses of the 23 foreign parties which have been assessed penalties by Customs for violations of section 592 are listed below pursuant to section 592A. This list supersedes any previously published list. The names and addresses of the 23 foreign parties are as follows (the parenthesis following the listing sets forth the month and year in which the name of the company was first published in the **Federal Register**):

Austin Pang Gloves & Garments Factory, Ltd., Jade Heights, 52 Tai Chung Kiu Road, Flat G, 19/F, Shatin, New Territories, Hong

Kong. (10/99)

Beautiful Flower Glove Manufactory, Kar Wah Industrial Building, 8 Leung Yip Street, Room 10–16, 4/F, Yuen Long, New Territories, Hong Kong. (10/99)

BF Manufacturing Company, Kar Wah Industrial Building, Leung Yip Street, Flat 13, 4/F, Yeun Long, New Territories, Hong Kong. (10/99)

Ease Keep, Ltd., 750 Nathan Road, Room 115, Kowloon, Hong Kong. (10/99)

Everlast Glove Factory, Goldfield Industrial Centre, 1 Sui Wo Road, Room 15, 15th Floor, Fo Tan, Shatin, New Territories, Hong Kong. (3/99)

Everlite Manufacturing Company, P.O. Box 90936, Tsimshatsui, Kowloon, Hong Kong. (3/01)

Excelsior Industrial Company, 311–313 Nathan Road, Room 1, 15th Floor, Kowloon, Hong Kong. (9/98)

Fabrica de Artigos de Vestuario E-Full, Lda. Rua Um doi Bairro da Concordia, Deificio Industrial Vang Tai, 8th Floor, A–D, Macau. (10/99)

Fabrica de Artigos de Vestuario Fan Wek Limitada, Av. Venceslau de Morais, S/N 14 B–C, Centro Ind. Keck Seng (Torre 1), Macau. (10/99)

Fabrica de Artigos de Vestuario Pou Chi, Avenida General Castelo Branco, 13, Andar, "C" Edificio Wang Kai, Macau. (10/99)

Fairfield Line (HK) Co. Ltd., 60–66 Wing Tai Commer., Bldg. 1/F, Sheung Wan, Hong Kong. (3/01)

Glory Growth Trading Company, No.6 Ping Street, Flat 7–10, Block A, 21st Floor, New Trade Plaza, Shatin, New Territories, Hong Kong. (9/98)

G.P. Wedding Service Centre, Lee Hing Industrial Building, 10 Cheung Yue Street 11th Floor, Cheung Sha Wan, Kowloon, Hong Kong. (10/00)

Great Southern International Limited, Flat A, 13th floor, Foo Cheong Building, 82–86 Wing Lok Street, Central, Hong Kong. (9/98)

G.T. Plus Ltd., Kowloon Centre, 29–43 Ashley Road, 4/Fl, Tsimshatsui, Kowloon, Hong Kong. (3/99)

Liable Trading Company, 1103 Kai Tak Commercial Building, 62–72 Stanley Street, Kowloon, Hong Kong. (9/98)

Lucky Mind Industrial Limited, Lincoln Centre, 20 Yip Fung Street, Flat 11, 5/F, Fan Ling, New Territories, Hong Kong. (10/99)

Mabco Limited, 6/F VIP Commercial Centre, 116–120 Canton Road, Kowloon, Hong Kong. (3/99)

McKowan Lowe & Company Limited, 1001–1012 Hope Sea Industrial Centre, 26 Lam Hing Street, Kowloon Bay, Kowloon, Hong Kong. (9/98)

Rex Industries Limited, VIP Commercial Center, 116–120 Canton Road, 11th Floor, Tsimshatsui, Kowloon, Hong Kong. (9/98)

Sannies Garment Factory, 35–41 Tai Lin Pai Road, Gold King Industrial Building, Flat A & B, 2nd Floor, Kwai Chung, New Territories, Hong Kong. (9/98)

Shing Fat Gloves & Rainwear, 2 Tai Lee Street, 1–2 Floor, Yuen

Long, New Territories, Hong Kong. (9/98)

Sun Kong Glove Factory, 188 San Wan Road, Units 32–35, 3rd Floor, Block B, Sheung Shui, New Territories, Hong Kong. (9/98)

Any of the above parties may petition to have its name removed from the list. Such petitions, to include any documentation that the petitioner deems pertinent to the petition, should be forwarded to the Assistant Commissioner, Office of Field Operations, United States Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

ADDITIONAL FOREIGN ENTITIES

In the October 18, 2000, **Federal Register** notice, Customs also solicited information regarding the whereabouts of 26 foreign entities, which were identified by name and known address, concerning alleged violations of section 592. Persons with knowledge of the whereabouts of those 26 entities were requested to contact the Assistant Commissioner, Office of Field Operations, United States Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

In this document, a new list is being published which contains the names and last known addresses of 11 entities. This reflects the removal of fifteen entities from the list of 26 entities published on October 18, 2000.

Customs is soliciting information regarding the whereabouts of the following 11 foreign entities concerning alleged violations of section 592. Their names and last known addresses are listed below (the parenthesis following the listing sets forth the month and year in which the name of the company was first published in the **Federal Register**):

Au Mi Wedding Dresses Company, Dragon Industry Building, 98, King Law Street, Unit F, 9/F, Lai Chi Kok, Kowloon, Hong Kong. (10/99)

Fabrica de Artigos de Vestuario Lei Kou, No. 45 Estrada Marginal de Areia Preta, Edif.Ind.Centro Polytex, 6th Floor, D, Macau. (9/98)

Golden Perfect Garment Factory, Wong's Industrial Building, 33 Hung To Road, 3rd Floor, Kwun Tong, Kowloon, Hong Kong. (9/98)

Golden Wheel Garment Factory, Flat A, 10/F, Tontex Industrial Building, 2–4 Sheung Hei Street, San Po Kong, Kowloon, Hong Kong. (10/99)

K & J Enterprises, Witty Commercial Building, 1A–1L Tung Choi Street, Room 1912F, Mong Kok, Kowloon, Hong Kong. (9/98)

Lai Cheong Gloves Factory, Kar Wah Industrial Building, 8 Leung Yip Street, Room 101, 1–F, Yuen Long, New Territories, Hong Kong. (3/00)

Maxwell Garment Factory, Unit C, 21/F, 78–84, Wang Lung Street, Tseun Wan, New Territories, Hong Kong. (3/99)

New Leo Garment Factory Ltd, Galaxy Factory Building, 25–27 Luk Hop Street, Unit B, 18th Floor, San Po Kong, Kowloon, Hong Kong. (9/98)

Penta-5 Holding (HK) Ltd., Metro Center II, 21 Lam Hing Street, Room 1907, Kowloon Bay, Kowloon, Hong Kong. (9/98)

Tak Hing Textile Company Limited, Wo Fung Industrial Building, 3/F, Block D, Lot No. 5180, IN D.D 51, On Lok Village, Fanling, New Territories, Hong Kong. (3/99).

Wing Lung Manufactory, Hing Wah Industrial Building, Units 2, 5–8, 4th Floor YLTL 373, Yuen Long, New Territories, Hong Kong. (9/98)

If you have any information as to a correct mailing address for any of the above 11 firms, please send that information to the Assistant Commissioner, Office of Field Operations, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

Dated: March 30, 2001.

BONNI G. TISCHLER,
Assistant Commissioner,
Office of Field Operations.

U.S. Customs Service

April 4, 2001

Department of the Treasury
Office of the Commissioner of Customs
Washington, D.C.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

U.S. Customs Service

General Notices

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF EVAPORATIVE AIR COOLERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to tariff classification of evaporative air coolers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of evaporative air coolers under the Harmonized Tariff Schedule of the United States ("HTSUS") and any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published in the CUSTOMS BULLETIN on December 20, 2000. One comment was received in response to the notice. That comment is discussed in the attached ruling HQ 964369.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 17, 2001.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, General Classification Branch, (202) 927-2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the CUSTOMS BULLETIN on December 20, 2000, proposing to revoke a ruling letter pertaining to the tariff classification of evaporative air coolers. As explained in a notice published on February 21, 2001, in Vol. 35, No. 8 of the CUSTOMS BULLETIN, the period within which to submit comments on this proposal was extended to March 23, 2001. One comment was received in response to the notices. That comment is discussed in the attached ruling HQ 964369.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking HQ 953762 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 964369. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. HQ 964369 is set forth as an attachment to this document.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: March 29, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

March 29, 2001
CLA-2 RR:CR:GC 964369 GOB
Category: Classification
Tariff No. 8479.60.00; 8509.80.00; 8479.90.95; 8509.90.55

CELSIUS, INC.
4241 Brickell Street
Ontario, CA 91761

Re: HQ 953762 revoked; Evaporative air coolers.

DEAR SIR OR MADAM:

This pertains to HQ 953762, issued to the U.S. Customs office in Los Angeles, on June 29, 1993, with respect to Protest 2704-92-104992, which was filed on your behalf. In that ruling, which granted your protest, certain air coolers were found to be classified in subheading 8415.83.00, Harmonized Tariff Schedule of the United States ("HTSUS"), as other air conditioning machines, not incorporating a refrigerating unit. Certain spare parts were found to be classified in subheading 8415.90.00, HTSUS.

As detailed below, we now believe these classifications to be incorrect. This ruling sets forth the correct classifications. This ruling has no effect on the Customs entries which were the subject of the protest.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of HQ 953762, as described below, was published in the CUSTOMS BULLETIN on December 20, 2000. As explained in a notice published on February 21, 2001, in Vol. 35, No. 8 of the CUSTOMS BULLETIN, the period within which to submit comments on this proposal was extended to March 23, 2001. One comment was received in response to the notices. The commenter claims that the goods at issue fall squarely within heading 8415, HTSUS, because they are designed to change both air temperature and humidity by efficiently generating evaporated water into the surrounding air. The commenter states that, based upon Note 2 to Chapter 84, HTSUS, the goods are classified in subheading 8415.83.00, HTSUS. For reasons described in the LAW AND ANALYSIS section of this ruling, we disagree with the commenter.

Facts:

The air coolers were described as follows in HQ 953762:

> The merchandise, Celsius model WF-902 air cooler, is a portable appliance which is used to cool and/or humidify air in hot, dry climates such as is found in the southwestern United States. The air cooler is powered by an electric motor and contains a three-speed fan, a tank capable of holding 2.3 gallons of cold water, and a filter pad. It draws room air in past the cold water and through the filter pad, causing the temperature of the air to drop due to evaporation. This process results in an increase in the humidity of the air. The air cooler is capable of cooling rooms up to 175 square feet in size.
>
> Various spare parts for the coolers were also the subject of the protest.

Issue:

What is the tariff classification of the air coolers and spare parts?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN's") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN's provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80.

The HTSUS provisions under consideration are as follows:

8415	Air conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity, including those machines in which the humidity cannot be separately regulated; parts thereof:
	Other, except parts:
8415.83.00	Incorporating a refrigerating unit
* * * * * *	
8479	Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof:
8479.60.00	Evaporative air coolers
* * * * * *	
8509	Electromechanical domestic appliances, with self-contained electric motor; parts thereof:
8509.80.00	Other appliances.

Note 2 to Chapter 84, HTSUS, provides in pertinent part: "Subject to the operation of note 3 to Section XVI, a machine or appliance which answers to a description in one or more of the headings 8401 to 8424 and at the same time to a

description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the former group and not the latter."

Note 3 to Chapter 85, HTSUS, provides: "Heading 8509 covers only the following electromechanical machines of the kind commonly used for domestic purposes: ... (b) Other machines provided the weight of such machines does not exceed 20 kg, exclusive of extra interchangeable parts or detachable auxiliary devices."

As stated above, in HQ 953762 dated June 29, 1993, we determined that the air coolers were classified under subheading 8415.83.00, HTSUS, as other air conditioning machines, not incorporating a refrigerating unit; and that the spare parts were classifiable under subheading 8415.90.00, HTSUS, as parts for air conditioning machines.

At HSC 13, the Harmonized System Committee of the World Customs Organization ("WCO") took a decision to amend the *Compendium of Classification Opinions* by insertion of Opinion 8479.89/9, which may be found at Annexes F/11 and L/16 to Doc. 38.760 E (HSC/13/Apr. 94). That opinion involved an article described as: "Evaporative air coolers of a weight exceeding 20 kg, which cool air by the latent heat of evaporation principle, incorporating a water-circulating system (comprising a built-in tank and pump) designed to continuously soak a filter and with an electric motor-driven fan which expels air through the filter medium. They do not include a device specially designed for humidifying or drying the air." The HSC determined the evaporative air coolers to be classified in subheading 8479.89, HTSUS, which covers "Other machines and mechanical appliances: ... Other: ..." within heading 8479, HTSUS. As we stated in T.D. 89–80, decisions in the *Compendium of Classification Opinions* should be treated in the same manner as the EN's, *i.e.*, while neither legally binding nor dispositive, they provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. T.D. 89–80 further states that EN's and decisions in the *Compendium of Classification Opinions* "should receive considerable weight."

We interpret the text of heading 8415, HTSUS ("... elements for changing the temperature and humidity ...") in light of EN 84.15, which provides, in pertinent part: "This heading applies **only** to machines: (1) Equipped with a motor-driven fan or blower, **and** (2) Designed to change both the temperature (a heating or cooling element or both) and the humidity (a humidifying or drying element or both) of air, ..." [Emphasis in original.] As stated above, the HSC opinion stated that evaporative air coolers "... do not include a device specially designed for humidifying or drying the air." Accordingly, because they are not designed to change the humidity, it is our view that evaporative air coolers are not described in heading 8415, HTSUS. Therefore, we disagree with the opinion expressed by the commenter.

In 1996, subsequent to the WCO opinion, subheading 8479.60.00, covering "Evaporative air coolers," was added to the HTSUS. EN 84.79(III)(31) provides that : "This group includes: ... Evaporative air coolers."

It is our determination that the goods in HQ 953762 are evaporative air coolers. Their function is described in that ruling as follows: "The air cooler draws room air in past the cold water and through the filter pad, causing the temperature of the air to drop due to evaporation."

Accordingly, it is our determination that evaporative air coolers of a weight exceeding 20 kilograms are classified in subheading 8479.60.00, HTSUS. This is consistent with the WCO opinion cited above. The evaporative air coolers have individual functions as stated in heading 8479, *i.e.*, they are mechanical devices whose function can be performed distinctly from and independently of any other machine or appliance. *See* EN 84.79.

We further determine that evaporative air coolers of a weight of 20 kilograms or less are classified in subheading 8509.80.00, HTSUS. Note 3 to Chapter 85, HTSUS, excerpted above, provides that heading 8509 covers certain other machines provided that their weight does not exceed 20 kilograms.

We have not been able to determine the weight of the air coolers in HQ 953762, although we believe it is likely that their weight does not exceed 20 kilograms.

This inability to determine the weight of the coolers in HQ 953762 does not detract from this ruling, since this ruling is prospective.

With respect to the parts of the evaporative air coolers, those parts not excluded by Note 1 to section XVI, HTSUS, or Note 1 to Chapter 84 and 85, nor included in other headings of Chapter 84 or 85 by Note 2(a) to Section XVI, HTSUS, and which are solely or principally used with evaporative air coolers of heading 8479 or heading 8509, are classified in subheading 8479.90.95, HTSUS, or subheading 8509.90.55, as appropriate (*i.e.*, depending on the size of the evaporative air coolers).

Holding:

Evaporative air coolers which weigh more than 20 kilograms are provided for in heading 8479, HTSUS, and are classified in subheading 8479.60.00, HTSUS, as: "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter ...: Evaporative air coolers." Evaporative air coolers which weigh 20 kilograms or less are provided for in heading 8509, HTSUS, and are classified in subheading 8509.80.00, HTSUS, as: "Electromechanical domestic appliances, with self-contained electric motor ...: Other appliances."

With respect to the parts of the evaporative air coolers, those parts not excluded by Note 1 to section XVI, HTSUS, or Note 1 to Chapter 84 and 85, nor included in other headings of Chapter 84 or 85 by Note 2(a) to Section XVI, HTSUS, and which are solely or principally used with evaporative air coolers of heading 8479 or heading 8509, are classified in subheading 8479.90.95, HTSUS, or subheading 8509.90.55, as appropriate – they are classified in subheading 8479.90.95 if they are parts for evaporative air coolers of a weight greater than 20 kilograms; they are classified in subheading 8509.90.55 if they are parts for evaporative air coolers of a weight of 20 kilograms or less.

Effect on other Rulings:

HQ 953762 is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF BULK IMPORTATIONS OF VANILLA ICINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of ruling letter and revocation of treatment relating to the classification of bulk importations of vanilla icings.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of bulk importations of vanilla icings and revoking

any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed revocation was published in the CUSTOMS BULLETIN of February 21, 2001, Vol. 35, No. 8. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after June 17, 2001.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202-927-1396.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8,1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on February 21, 2001, in the CUSTOMS BULLETIN, Vol. 35, No. 8, proposing to modify New York Ruling Letter (NY) E86861, dated January 27, 2000, pertaining to the tariff classification of bulk importations of vanilla icings under the Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in reply to the notice.

In NY E86861, dated January 27, 2000, the classification of a product commonly referred to as cake icings containing over 65% by dry weight of sugar that are intended for repackaging in the U.S. into retail containers for use by the ultimate consumer, were classified as other food preparations not elsewhere specified of included, containing over 65% dry weight of sugar, in subheading 2106.90.9400, HTSUS, a tariff rate quota provision. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchan-

dise and has determined that classification is in error and that the product is properly classified in subheading 2106.90.9997, HTSUS, as other articles containing sugar derived from sugar cane or sugar beets, not subject to quota.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is modifying NY E86861, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 963834 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

As stated in the proposal notice, this modification will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised the Customs Service during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this notice.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: March 28, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

March 28, 2001
CLA-2 RR:CR:GC 963834ptl
Category: Classification
Tariff No. 2106.90.9997

MR. JAMES A. WIANT
GENERAL MANAGER
CSP
23240 Chagrin Boulevard, Suite 810
Beachwood, OH 44122

Re: Modification of New York Ruling Letter (NYRL) E86861; Vanilla Icings.

DEAR MR. WIANT:

In your letter dated February 9, 2000, you requested reconsideration of NYRL E86861, dated January 27, 2000, issued in response to your request for a ruling on August 31, 1999. NYRL E86861 held that vanilla cake icings from Canada that contained 78% sucrose by dry weight and imported in bulk, were classified in subheading 2106.90.9400, Harmonized Tariff Schedule of the United States (HTSUS), a tariff rate quota provision, as other food preparations not elsewhere specified or included, containing over 65% by dry weight of sugar. When imported in one-ounce cup retail containers, it was held that the icings were classified in subheading 2106.90.9997, HTSUS, a provision not subject to a tariff rate quota. You indicate that the bulk shipments are intended to be repackaged in the United States into retail containers and therefore they are also classifiable in subheading 2106.90.9997, HTSUS. Our decision follows.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of NYRL E86861 was published on February 21, 2001, in the CUSTOMS BULLETIN, Vol. 35, No. 8. No comments were received.

Facts:

A vanilla cake icing was described in NYRL E86861 as a soft, white, spreadable paste said to be composed of 55–65% liquid sugar, 20–25% icing sugar, 3–8% water, 3–5% dextrose, and other ingredients. A Customs laboratory analysis of a sample, indicated that the icing contained 78% sucrose by dry weight. The product is stated to be ready for use without further preparation. The product will be imported either in one-ounce cups for distribution to retail consumers or imported in bulk containers for repackaging into one-ounce cups for distribution to retail consumers. In your letter of February 9, 2000, you stated as follows:

The product packaged in a tote will be used to subsequently pack into small cups in the United States. There is no further processing of the icing. It is not an industrial ingredient, rather a consumer ingredient shipped in bulk. A U.S. firm will pump the icing into a hopper and pack it into small portions.

Issue:

Whether under Additional U.S. Note 2, Section IV, HTSUS, and Additional U.S. Notes 2 and 3, Chapter 17, HTSUS, imported bulk shipments of cake icings containing over 65% sucrose, intended for repackaging in the U.S. into one-ounce cup retail containers, are classified in subheading 2106.90.9997, HTSUS

Law and Analysis:

The classification of imported merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section and chapter notes and, unless otherwise required, according to the remaining GRI's, taken in their appropriate

order. We are satisfied that the ready-to-use cake icings are classified by virtue of GRI 1, depending on the interpretations of applicable Additional U.S. Notes.

The pertinent provisions of the tariff are as follows.

	Other food preparations not elsewhere specified or included:
	Articles containing over 65 percent by dry weight of sugar described in additional U.S. note 2 to chapter 17:
2106.90.92	Described in additional U.S. note 7 to chapter 17 and entered pursuant to its provisions.....
2106.90.94	Other 2/
	Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17:
2106.90.95	Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions
2106.90.97	Other 3/
2106.90.99	Other
	**********
	Other: Other:
	Frozen
	Other:
2106.90.9997	containing sugar derived from sugar cane and/or sugar beets

1/ *See* subheadings 9904.17.66-9904.17.84.
2/ *See* subheadings 9904.17.17-9904.17.48.
3/ *See* subheadings 9904.17.49-9904.17.65.

Additional U.S. Notes 2 and 3, Chapter 17, HTSUS, state as follows:

2. For the purposes of this schedule, the term "articles containing over 65 percent by dry weight of sugar described in additional U.S. note 2 to chapter 17" means articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported.

3. For the purposes of this schedule, the term "articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17" means articles containing over 10 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, except (a) articles not principally of crystalline structure or not in dry amorphous form, the foregoing that are prepared for marketing to the ultimate consumer in the identical form and package in which imported; (b) blended syrups containing sugars derived from sugar cane or sugar beets, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; (c) articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients,

capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; or (d) cake decorations and similar products to be used in the same condition as imported without any further processing other than the direct application to individual pastries or confections, finely ground or masticated coconut meat or juice thereof mixed with those sugars, and sauces and preparations therefor.

Additional U.S. Note 2, Section IV, HTSUS, defines the terms of Additional U.S. Notes 2 and 3, Chapter 17, HTSUS, as follows:

For the purposes of this section, unless the context otherwise requires–

(a) the term "percent by dry weight" means the sugar content as a percentage of the total solids in the product;

(b) the term "capable of being further processed or mixed with similar or other ingredients" means that the imported product is in such condition or container as to be subject to any additional preparation, treatment or manufacture or to be blended or combined with any additional ingredient, including water or any other liquid, other than processing or mixing with other ingredients performed by the ultimate consumer prior to consumption of the product;

(c) the term "prepared for marketing to the ultimate consumer in the identical form and package in which imported" means that the product is imported in packaging of such sizes and labeling as to be readily identifiable as being intended for retail sale to the ultimate consumer without any alteration in the form of the product or its packaging; and

(d) the term "ultimate consumer" does not include institutions such as hospitals, prisons and military establishments or food service establishments such as restaurants, hotels, bars or bakeries.

We first have to consider whether the icings are classified in the tariff rate quota provisions of subheadings 2106.90.92 and 2106.90.94, HTSUS, as articles containing over 65% by weight of sugar as described in Additional U.S. Note 2, Chapter 17. The Note requires that articles must contain over 65% cane or beet sugar, must be capable of being further processed or mixed with other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported. The icings contain over 65% sugar by dry weight and are imported in bulk. In Headquarters Ruling Letter (HQ) 960694, dated March 20, 1998, affirmed by HQ 963649, dated May 9, 2000, Customs concluded that icings and glazes used by *commercial bakers* that were combined with cakes and pastries satisfied the "capable of being further processed..." requirement of Additional U.S. Note 2(b), Section IV, HTSUS. Thus, the icings that meet the three requirements are classified in subheadings 2106.90.92 and 2106.90.94, HTSUS, as held in HQs 960694 and 963649.

Cake icings containing over 65% by dry weight of sugar imported in *retail containers*, do not meet the three requirements of Additional U.S. Note 2, Chapter 17, HTSUS, and are not classified in subheadings 2106.90.92 and 2106.90.40, HTSUS. Specifically, they fail the requirement that they not be **"prepared for marketing to the ultimate consumer in the identical form and package in which imported."** Although not described by the tariff rate quota of Additional U.S. Note 2, Chapter 17, articles containing over 10 percent by dry weight of sugar may be classified in the tariff rate quota subheadings 2106.90.95 and 2106.90.97, HTSUS, if described by Additional U.S. Note 3 of Chapter 17. However, Additional U.S. Note 3(d), Chapter 17 (not applicable for articles classified in subheadings 2106.90.92 and 2106.90.94) excludes from subheadings 2106.90.95 and 2106.90.97, HTSUS, "cake decorations and similar products to be used in the same condition as imported without any further processing other than the direct application to individual pastries or confections...". Such articles are classified in subheading 2106.90.9997, HTSUS, not subject to tariff rate quotas. Thus, the vanilla cake icings imported in one-ounce cups containing over 65% cane or beet sugar by dry weight as described in NYRL E86861 were classified in subheading 2106.90.9997, HTSUS, as other articles containing cane or beet sugar, not subject to quota. You

request the same classification treatment for the bulk importations that are repackaged in the U.S. into retail containers.

The other product is vanilla cake icings containing over 65% by dry weight of sugar and imported in bulk rather than for marketing to the ultimate consumer. These bulk packages meet two of the three requirements for Additional U.S. Note 2, Chapter 17. However, they fail to meet the third requirement, that is "capable of being further processed...". The phrase "capable of being further processed or mixed with similar or other ingredients" is defined in Additional U.S. Note 2(b), Section IV, HTSUS, as meaning:...the imported product is in such condition or container as to be subject to any additional preparation, treatment or manufacture or to be blended or combined with any additional ingredient, including water or any other liquid, **other than processing or mixing with other ingredients performed by the ultimate consumer prior to consumption of the product**. (Emphasis added.)

As noted above, in HQ 960694, affirmed by HQ 963649, that icing for "untopped" donuts, pastries, etc., is an "ingredient," for purposes of this Note, and applying icing to such products is an operation that falls within the scope of the quota. However, the Note also provides an exception to this sort of processing, an exception that would remove bulk icing from the quota. The exception exists when the processing or mixing is performed by the ultimate consumer prior to consumption of the product. When icing containing over 65 percent sugar is imported and repackaged in the United States into retail units, the "mixing with other ingredients" will be performed by the retail consumer, the "ultimate consumer." This is the very exception Additional U.S. Note 2(b), Section IV, provides. Accordingly, the icings, when repackaged in the United States into retail containers, are classified in subheading 2106.90.9997, HTSUS, not subject to tariff rate quotas. *See* NYRL C81107, dated November 18,1997.

In such repackaging of bulk icings after importation for retail use, we have, in effect, "actual use" situations as defined in Additional U.S. Rules of Interpretation, HTSUS, Note 1(b). The regulatory procedures for actual use are contained in 19 CFR 10.131–10.139. The procedures safeguard against the possibility that an importer may import in bulk with a claim for repackaging into retail containers and then use the merchandise in industrial use to avoid the quota without penalty.

Holding:

Ready- to-use imported bulk shipments of cake icings containing over 65% by dry weight of sugar that are intended for repackaging in the U.S. into retail containers for use by the ultimate consumer (other than bakeries, etc.), are classified as other articles containing sugar derived from sugar cane or sugar beets, in subheading 2106.90.9997, HTSUS, not subject to quota, upon compliance with the actual use procedures of 19 CFR 10.131–10.139.

NYRL E86861 dated January 27, 2000, is modified. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF CHILDREN'S BATHROBES

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter and treatment relating to the classification of children's bathrobes.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of children's bathrobes. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before May 18, 2001.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: Joe Shankle, Textiles Branch: (202) 927-2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. ng out import requirements. For example, under section

484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of children's bathrobes. Although in this notice Customs is specifically referring to the revocation of Port Decision (PD) F80214, dated November 29, 1999 (attachment A); this notice covers any rulings on this merchandise which may exist but have not been specifically identified that are contrary to the position set forth in this notice. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C.1625 (c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise that is contrary to the position set forth in this notice. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice that is contrary to the position set forth in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

Customs previously classified children's bathrobes constructed of woven cotton terry cloth towels that had a hole cut out in the center to which a hood was sewn, under heading 6208, HTSUSA, which provides for, among other things, bathrobes, dressing gowns and similar articles. PD F80214 classified almost identical children's bathrobes in heading 6211, HTSUSA, which provides for, among other things, other garments, women's or girls', of cotton, other, other. Based on our analysis of the scope of the terms of headings 6208, HTSUSA, and 6211, HTSUSA, the Legal Notes, and the Explanatory Notes, children's bathrobes of the type discussed herein, are classifiable in subheading 6208.91.1020, HTSUSA, which provides for, among other things, girls' cotton bathrobes, dressing gowns and similar articles.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke PD F80214 and any other ruling not specifically identified, that is contrary to the position set forth in this notice, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 964641 (attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions that are contrary to the position set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 28, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

November 29, 1999
APP-2-62:PD:TC:MEF G28
Category: Classification
Tariff No. 6211.42.0081

MR. SEAN COLE
IMPORT MANAGER
ASG USA
30 Pulaski Street
Bayonne, New Jersey 07002

Re: The tariff classification of Children's Woven Cotton Terry Cloth Hooded Cover-up from China or India.

DEAR MR. COLE:

In your letter dated November 18, 1999, you requested a tariff classification ruling on behalf of your client, Town & Country Linen Corp., 475 Oberlin Avenue South, Lakewood, New Jersey 08701.

The sample submitted is a Children's Cover-up constructed from a 100 % Cotton Woven Terry Cloth Towel. An oval shaped opening has been cut into the center of the towel. Sewn into the opening is a Terry Cloth Hood. Animal characteristics, including embroidered eyes, and the floppy ears and trunk of an elephant are sewn onto the hood. The ears and trunk are constructed of woven fabric in contrasting colors. You state the hoods will feature character designs of various animals. The sides of the garment are completely open. The bottom borders will either be plain or feature a dobby weave. The weight of each garment will be 390 grams. You state the item will be imported in one size. In response to your request, the sample will be returned to you.

The applicable subheading for the 100% Cotton Woven Terry Cloth Hooded

Cover-up will be 6211.42.0081, Harmonized Tariff Schedule of the United States (HTS), which provides for Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of cotton: Other. The 1999 rate of duty is 8.4%. The rate of duty for 2000 will be 8.3%.

The Terry Cloth Hooded Cover-up falls within Textile Category Designation 359. Based upon international textile trade agreements, products of China and India are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and *changes*. To obtain the most current information, we suggest that you check close to the time of shipment, the *U. S. Customs Service Textile Status Report*, an internal issuance of the U. S. Customs Service, which is available at the Customs Web Site at www.customs.ustreas.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

CAROLE E. GRAVES,
Port Director, Port of Baltimore.

[ATTACHMENT B]

CLA-2:RR:CR:TE 964641 JFS
Category: Classification
Tariff No. 6208.91.1020

MR. SEAN COLE
IMPORT MANAGER
ASG USA
30 Pulaski Street
Bayonne, NJ 07002

Re: Revocation of PD F80214, Dated November 29, 1999; Classification of Children's Bathrobes; Heading 6208, HTSUSA.

DEAR MR. COLE:

This letter is to inform you that Customs has reconsidered Port Decision Letter (PD) F80214, dated November 29, 1999, addressed to you on behalf of your client Town & Country Linen Corp., concerning the classification of a child's bathrobe under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). After review of that ruling, it has been determined that the classification of the child's bathrobe in subheading 6211.42.0081, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes PD F80214.

Facts:

In PD F80214, the sample was described in pertinent part as a children's cover-up constructed from a 100% cotton woven terry cloth towel. An oval shaped opening was cut into the center of the towel. Sewn into the opening was a terry cloth hood. Animal characteristics, including embroidered eyes, and the floppy ears and trunk of an elephant were sewn onto the hood. The ears and trunk were con-

structed of woven fabric in contrasting colors. The sides of the cover-up were completely open. The garments were to feature character designs of various animals.

In response to your letter dated November 18, 1999, requesting a tariff classification of the cover-up, the garment was classified under subheading 6211.42.0081, HTSUSA, which provides for, among other things, track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of cotton: Other.

Issue:

What is the proper classification of the child's cover-up?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

Heading 6208, HTSUS, provides for, among other things, bathrobes. "Bathrobe" is defined in *Webster's Ninth New Collegiate Dictionary*, 1991, at 135 as "a loose usually absorbent robe worn before and after bathing or as a dressing gown." It is clear that a bathrobe is to be worn on the person as a garment. It is an article of clothing, which has some form of styling, covers the wearer, and features some type of closure for modesty purposes.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are not legally binding, but represent the official interpretation of the Harmonized System at the international level. The ENs describe the scope of heading 6208, HTSUSA, in relevant part, as follows:

> The heading also includes nightdresses, pyjamas, negligees, bathrobes (including beachrobes), dressing gowns and similar articles for women or girls (garments usually worn indoors).

"Beachrobes," included in the parenthetical following bathrobes, have the same features and functions as bathrobes, although they are worn in a different setting. They are both designed to be worn after the wearer has been in the water. They absorb water, provide warmth, protect the body, and cover the body for modesty purposes. Likewise, the subject merchandise is also designed to be worn after the wearer has been in the water. It provides warmth and protection, and the terry cloth absorbs water. The fact that it has no closure for modesty purposes, is less relevant because the young children for whom it is designed, are less likely to be concerned about modesty.

The plain language of heading 6208, HTSUSA, provides for bathrobes and similar articles. Under the rule of *ejusdem generis*, where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. The cover-up, by having the similar features and functions as a bathrobe is clearly of the same kind as a bathrobe. Thus, the cover-up falls within the category of similar articles.

Finding that the subject garment is a bathrobe or similar article is consistent with prior Customs rulings. In Headquarters Ruling Letter (HQ) 960541, dated December 9, 1997, Customs classified garments that were nearly identical to the instant cover-up under heading 6208, HTSUSA, as bathrobes. In that case, the garment was made from 100% cotton terry cloth and had a hole cut out in the center to which a hood was sewn. The garment was made with appliqués representing Sylvester the Cat. Customs ruled that:

> [W]hile the subject garment is not a robe *per se* in that it lacks sleeves, it does have several bathrobe features: it is composed of absorbent cotton terry, it is used before and after bathing, and it covers the wearer in the front and back for modesty purposes.

See also, NY C87870, dated May 27, 1998.

Finally, heading 6208, HTSUSA, more accurately describes the cover-up under consideration. In PD F80214, the subject merchandise was classified under the residual provision of subheading 6211.42, HTSUSA. Heading 6208, HTSUSA, provides for bathrobes and similar articles, which is a more specific description of the cover-up than is "other garments" of heading 6211, HTSUSA. Accordingly, the subject merchandise is properly classifiable in heading 6208, HTSUS, at GRI 1.

Holding:

The child's bathrobe is properly classifiable under subheading 6208.91.1020, HTSUSA, which provides for, among other things, "Women's or girls' singlets and other vests, slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles. Other: Of Cotton: Bathrobes, dressing gowns and similar articles: Girl's." The applicable rate of duty is 7.8% *ad valorem*, and the quota category is 350.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, the importer should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF THE MAX MULTIPURPOSE TOOL

AGENCY: U. S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to tariff classification of the Max Multipurpose Tool.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of the Max™ Multipurpose Tool, and to revoke any treatment Customs has previously accorded to substantially identical transactions. The merchandise consists of an axe with handle, a shovel head, rake head, hoe head, mattock head, broad pick head and standard pick head, together with a thumbscrew and bar tightener, a leather axe sheath and canvas bag for holding attachments. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before May 18, 2001.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling on the classification under the HTSUS of the Max™ Multipurpose Tool. The merchandise consists of an axe with handle, a shovel head, rake head, hoe head, mattock head, broad pick head and standard pick head, together with a thumbscrew and bar tightener, a leather axe sheath and canvas bag for holding attachments. Although in this notice Customs is specifically referring to one ruling, NY 875212, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been identified. Any party who has received an interpretative ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C.

1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In NY 875212, dated June 23, 1992, the Max™ Multipurpose Tool was found to be a composite good, classifiable as if consisting of the tool which imparted the essential character to the good. As the mattock, pick attachments, hoe and rake were found to impart the essential character to the whole, the Max™ Multipurpose Tool was classified in subheading 8201.30.00, HTSUS, a provision for mattocks, picks, hoes, and rakes. NY 875212 is set forth as "Attachment A" to this document.

It is now Customs position that the Max™ Multipurpose Tool is classifiable in subheading 8201.40.60, HTSUS, a provision for axes, bill hooks and similar hewing tools. Pursuant to 19 U.S.C. 1625(c)(1)), Customs intends to revoke NY 875212 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis in HQ 964935, which is set forth as "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment it previously accorded to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: March 29, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

June 23, 1992
CLA82:S:N:N1:115 875212
Category: Classification
Tariff No. 8201.30.0000; 9801.00.1082

MR. BRUCE MOORE
FORREST TOOL COMPANY
P.O. Box 768
Mendocino, CA 95460

Re: The tariff classification of the "Max" Multipurpose Tool from China.

DEAR MR. MOORE:

In your letter dated May 13, 1992, you requested a tariff classification ruling.

The subject item is designated as the "Max" Multipurpose Tool. This tool is in fact a system of tools designed to perform various functions. In its imported condition, the tool comprises the following:

1. U.S.A. hickory handle axe assembled to an axe head
2. Shovel attachment
3. Straight pick attachment
4. Chisel pick attachment
5. Mattock attachment
6. Reversible rake/hoe attachment

All of the articles (except the hickory handle) above are made of steel in China. In addition, the following are also included in the boxed tool:

a) A thumbscrew and bar tightener (country of origin China)
b) A leather axe sheath (country of origin U.S.A.)
c) A canvas bag for holding attachments (country of origin U.S.A.)

The entire tool system is designed for use by such agencies as the U.S. Department of Agriculture, the Department of the Interior and the Army Corps of Engineers, etc. Several possible uses of this tool include the planting of seedlings, removing rocks, breaking up cement, digging wells, fighting forest fires, etc. Each of the individual attachment tools is designed to be attached to the axe head to create the second tool. The axe handle becomes the handle for a shovel or pick, etc. Each of the tool attachments is in effect an unassembled tool.

Your merchandise is considered composite goods, consisting of different materials or made up of different components. This item shall be classified as if it consisted of the material or component which gives it its essential character. In this instance, the essential character is imparted by the mattock, pick attachments, rake and hoe, which are all classified under the identical tariff classification. The U.S. made axe sheath and the canvas bag are classified as American Goods Returned in 9801.00.1082 and are duty free. The "Max" tool set is packaged in a sealed individual carton and sold as such to the end user.

The applicable subheading for the "Max" tool will be 8201.30.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for mattocks, picks, hoes and rakes, and parts thereof... The duty rate will be 2.9% *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director, New York Seaport.

[ATTACHMENT B]

CLA-2 RR:CR:GC 964935 JAS
Category: Classification
Tariff No. 8201.40.60

MR. BRUCE MOORE
FORREST TOOL COMPANY
P.O. Box 768
Mendocino, CA 95460

Re: Max™ Multipurpose Tool.

DEAR MR. MOORE:

In NY 875212, which the Director of Customs National Commodity Specialist Division, New York, issued to you on June 23, 1992, the Max™ Multipurpose Tool was held to be classifiable in subheading 8201.30.00, Harmonized Tariff Schedule of the United States (HTSUS), a provision for mattocks, picks, hoes and rakes. We have reconsidered this classification and now believe it is incorrect.

Facts:

Submitted literature describes the Max™ Multipurpose Tool as consisting of a Hudson Bay style axe with handle, a shovel head, a rake head, a hoe head, a mattock head, a broad pick head and a standard pick head. Also included in this boxed tool is a thumbscrew and bar tightener, a leather axe sheath and a Cordura™ carrying case to hold the tools. The sheath and carrying case are apparently of U.S. origin.

The HTSUS provisions under consideration are as follows:

8201	Handtools of the kinds and base metal parts thereof: spades, shovels, mattocks, picks, hoes, forks and rakes; axes, bill hooks, and similar hewing tools; secateurs and pruners of any kind; scythes, sickels, hay knives, hedge shears, timber wedges and other tools of a kind used in agriculture, horticulture or forestry:
8201.30.00	Mattocks, picks, hoes and rakes, and parts thereof:
*	* * *
8201.40.60	Axes, bill hooks and similar hewing tools, and parts thereof

Issue:

Whether the Max™ Multipurpose Tool is a composite good for tariff purposes; whether an essential character can be established.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(b), HTSUS, states, in part, that composite goods consisting of different components are to be classified as if consisting of the component which gives the goods their essential character.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the

scope of each heading of the HTSUS. Customs believes the ENs should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 28, 1989).

There is no single HTSUS heading that describes the Max™ Multipurpose Tool. The goods are not classifiable under GRI 2 which applies to goods imported incomplete or unfinished. GRI 3(b) covers both composite goods and goods put up in sets for retail sale. Consideration was given to classifying the goods as a "set." However, although the merchandise is described as a "boxed tool," it is unclear whether this means it is put up in a manner suitable for sale directly to users without repacking. Relevant ENs on p. 4 state that under GRI 3(b), HTSUS, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts. The Max™ Multipurpose Tool qualifies as a composite good for tariff purposes.

The classification expressed in NY 875212 was based on the conclusion that the essential character of the good was imparted by the mattock, pick attachments, rake and hoe, all of which are classifiable in subheading 8201.30.00, HTSUS. This is incorrect and no longer represents Customs position in the matter. A closer review of the merchandise indicates that there is a tapered socket at the top of the axe head over which the other tool heads slide when in use. The tool heads are secured to the axe head by safety locking pins. The literature succinctly states "The tool is based around the axe." Because the axe head is constantly in use and is indispensable to the use of the other tools, we conclude that the axe imparts the essential character to the Max™ Multipurpose Tool. The good is to be classified as if consisting only of the axe component.

Holding:

Under the authority of GRI 3(b), the Max™ Multipurpose Tool is provided provided for in heading 8201. It is classfiable in subheading 8201.40.60, HTSUS. Although the carrying case is classifiable for tariff purposes as part of the composite good, as an article of man-made textile fibers and a product of Taiwan, it falls within textile category 670 (*see* subheading 4202.92.9026), and is subject to textile quota and visa requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF "NEEDLES" FOR USE WITH PNEUMATIC SCALERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and revocation of treatment relating to the classification of "needles" for use with pneumatic scalers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling and to revoke any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of "needles" for use with pneumatic scalers under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before May 18, 2001.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Room 3.4-A, Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 927-2318.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke New York Ruling Letter D83590, dated October 15, 1998, which pertains to the classification of "needles" for use with pneumatic scalers. The so-called "needles" are base metal articles that resemble nails and measure approximately 7 inches (18 mm) in length and approximately 1/8 inch (.4 mm) in

width. They are inserted into pneumatic scalers that are used for derusting, descaling and removing paint from surfaces. NY D83590 is set forth as "Attachment A" to this document.

Although in this notice Customs is specifically referring to one ruling, NY D83590, this notice covers any rulings on this merchandise that may exist but has not been specifically identified. Customs has undertaken reasonable efforts to search existing databases; no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, other than the referenced rulings (see above), should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY D83590 and to revoke any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 963639 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 29, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

October 15, 1998
CLA-2-84:RR:NC:115 D83590
Category: Classification
Tariff No. 8467.19.5090

MR. HERBERT WILLIAM JULICH
DELMAR INTERNATIONAL INC
147–55 175th Street
Jamaica, New York 11434

Re: The tariff classification of pneumatic needdles from United Kingdom.

DEAR MR. JULICH:

In your letter dated October 9, 1998, you requested a tariff classification ruling on behalf of your client Trelawny Pneumatic Tools.

The samples submitted are pneumatic needles used in hand operated pneumatic scalers.

The applicable subheading for the pneumatic needles will be 8467.19.5090, Harmonized Tariff Schedule of the United States (HTS), which provides for Tools for working in the hand, pneumatic hydraulic or with self contained non-electric motor, and parts thereof: Other. The rate of duty will be 0.5% *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212-466-5487.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

CLA-2 RR:CR:GC 963639 AML
Category: Classification
Tariff No. 8207.90.60

MR. HERBERT WILLIAM JULICH
DELMAR INTERNATIONAL INC.
147–55 175th Street
Jamaica, NY 11434

Re: Reconsideration of NY D83590; "needles" for use with pneumatic scalers.

DEAR MR. JULICH:

This is in reference to New York Ruling Letter (NY) D83590, issued to you by the Director, Customs National Commodity Specialist Division, New York, on behalf of Trelawny™ Pneumatic Tools, on October 15, 1998, which classified "needles" for use with pneumatic scalers under subheading 8467.19.5090 of the Harmonized Tariff Schedule of the United States (HTSUS). Subheading 8467.19.5090, HTSUS, provides for tools for working in the hand, pneumatic hy-

draulic or with self contained non-electric motor, and parts thereof: other. We have reconsidered NY D83590 and now believe that the classification set forth is incorrect. This letter sets forth the correct classification.

Facts:

The articles were described in NY D83590 as follows:

The samples submitted are pneumatic needles used in hand operated pneumatic scalers.

Contrary to the description in NY D83590, the needles themselves are not pneumatic, nor can they be described as such. Rather, they are base metal articles that resemble nails and measure approximately 7 inches (18 mm) in length and approximately 1/8 inch (.4 mm) in width. The heads of the articles resemble those of finishing nails, and the ends of the samples provided resemble those of a flat head screwdriver in one instance and a "blank" (a metal dowel with the end neither worked nor finished) in the other.

The so-called "needles" are base metal articles are inserted into pneumatic scalers that are used for derusting, descaling and removing paint from surfaces.

Issue:

Whether the "needles" for use with pneumatic scalers are classifiable under subheading 8207.90.60, HTSUS, which provides for interchangeable tools for hand tools, whether or not power operated . . . other interchangeable tools, and parts thereof: other: other: other: not suitable for cutting metal, and parts thereof: for hand tools and parts thereof; or under subheading 8467.19.5090, HTSUS, which provides for tools for working in the hand, pneumatic, hydraulic or with self-contained non-electric motor, and parts thereof: pneumatic, other: other?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRIs). GRI 1, HTSUS, provides, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes[.]"

The HTSUS provisions under consideration are as follows:

8207	Interchangeable tools for handtools, whether or not power-operated, or for machine-tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screwdriving), including dies for drawing or extruding metal, and rock Other interchangeable tools, and parts thereof:				
8207.90		Other interchangeable tools, and parts thereof:			
			Other:		
				Not suitable for cutting metal, and parts thereof:	
8207.90.60					For handtools, and parts thereof.

* * *

8467	Tools for working in the hand, pneumatic, hydraulic or with self-contained nonelectric motor, and parts thereof:				
	Pneumatic:				
8467.19		Other:			
8467.19.50			Other:		
8467.19.50.90					Other.

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper

interpretation of the HTSUS. Customs believes the ENs should always be consulted. *See*, T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The base metal "needles" are designed for use with pneumatic scalers. As such, they are *prima facie* classifiable under heading 8207, HTSUS, as interchangeable tools for handtools, and under heading 8467, HTSUS, as parts of pneumatic tools for working in the hand.

Initially we must consider whether the articles are parts of general use. Section XV, Note 2, HTSUS, states, in pertinent part, that: the expression "parts of general use" means: (a) articles of heading 7307 (tube or pipe fittings), 7312 (stranded wire, ropes, cable, etc.), 7315 (chain), 7317 (nails, tacks, etc.) or 7318 (fasteners) and similar articles of other base metals. Although the articles resemble nails in appearance, that is where their similarity ends. The articles at issue are specifically intended to be used with the hand held pneumatic scalers. Thus, the needles are not parts of general use.

Note 1(o) to Section XVI, HTSUS (within which heading 8467 is found), provides, in pertinent part, that Section XVI does not cover interchangeable tools of heading 82.07. Thus, if the articles are classifiable under heading 8207, HTSUS, they cannot be classified under heading 8467.

The General ENs to Chapter 82 provide, in pertinent part, that:

> This Chapter covers certain specific kinds of base metal articles, of the nature of tools, implements, cutlery, tableware, etc., which are excluded from the preceding Chapters of Section XV, and are not machinery or appliances of Section XVI (see below), nor instruments or apparatus proper to Chapter 90, nor articles of heading 96.03 or 96.04.
>
> This Chapter includes:
>
> * * *
>
> (C) Interchangeable tools for hand tools, for machine-tools or for power-operated hand tools (heading 82.07), knives and blades for machines or mechanical appliances (heading 82.08) and plates, sticks, tips and the like, for tools (heading 82.09).

The ENs to heading 8207 provide, in pertinent part, that:

> Whereas (apart from a few exceptions such as machine saw blades) the preceding headings of this Chapter apply in the main to hand tools ready for use as they stand or after affixing handles, this heading covers an important group of **tools which are unsuitable for use independently**, but are designed to be fitted, as the case may be, **into** (emphasis in original):
>
> (A) hand tools, whether or not power-operated (*e.g.*, breast drills, braces and die-stocks),
>
> (B) machine-tools, of headings 84.57 to 84.65, or of heading 84.79 by reason of Note 7 to Chapter 84,
>
> (C) tools of headings 84.67 and 85.08,
>
> for pressing, stamping, punching, tapping, threading, drilling, boring, reaming, broaching, milling, gear-cutting, turning, cutting, morticing or drawing, etc., metals, metal carbides, wood, stone, ebonite, certain plastics or other hard materials, or for screwdriving.

Although the term "tool" is not defined in the HTSUS or the ENs, it is presumed that Congress intended to apply its common and commercial meaning. *Brookside Veneers, LTD v. United States*, 847 F. 2d 789 (1988). To ascertain the common and commercial meaning of a term, dictionaries and other lexicographic authorities may be consulted. *Austin Chem. Co. v. United States*, 835 F. 2d 1423 (Fed. Cir.

1987). A "tool" is described as "[a] hand-held implement, as a hammer, saw, or drill, used in accomplishing work." *Webster's II New Riverside University Dictionary*, p. 1217 (1984).

The HTSUS, which went into effect January 1, 1989, is a relatively new tariff system with rules of interpretation and application somewhat different from the Tariff Schedules of the United States (TSUS), the predecessor to the HTSUS. As noted in House Conference Report No. 100–576, dated April 20, 1998, on the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100–418), decisions by the Customs Service and the courts interpreting nomenclature under the TSUS are not to be deemed dispositive in interpreting the HTSUS. Nevertheless, on a case-by-case basis, prior decisions should be considered instructive in interpreting the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTSUS.

In *T.G. Cullen, Inc. v. United States*, 69 Cust. 8, C.D. 4364 (1972), the Court addressed the classification of articles similar (if not identical) to those at issue. The Court, recounting the evidence before it, described the articles as "slender elongated article(s) (the shape of a nail), seven inches long, with a slightly oversized head as not to pass completely through the chamber of the tool holder, and a working end beveled on two sides to a straight edge that measures approximately two-sixteenths of an inch." *Id.* at 11. Other evidence considered by the Court demonstrated that the articles were used for "derusting, descaling and removing old paint surfaces." *Id.*

In reaching its conclusion that the so-called "needles" for "air guns" are interchangeable tools, the Court enunciated the following rationale:

> [I]n the tariff sense of the term "interchangeable tools", the term "tool" has the same broad signification as the synonymous term "instruments" meaning any implement or tool by which work is done. *United States v. Bliss & Co.* et al., 6 Ct. Cust Appls. 433, 440, T.D. 35980 (1915); *Audel's New Mechanical Dictionary* (1960) . . . The record establishes that the needles are designed to be fitted to the air gun and cannot be used independently. The fact that the air gun will do its work more efficiently when the tool holder is fully loaded with a set of needles does not derogate from the fact that "the working portion . . . is the needle, which is the part that * * * come[s] in contact with the surface * * *." *Id.* at 13.

The pneumatic scalers with which the "needles" are used satisfy this description. They are pneumatic, hand-held implements used to accomplish the work of removing rust, paint and other substances that cover (*i.e.*, old paint, varnish, etc.) or have accumulated (rust, pollutants, etc.) on a surface. The "needles" themselves, which are interchangeable and replaceable, are unsuitable for use independently, but are designed to be fitted into and used with the pneumatic scalers. Therefore, the articles are classifiable under heading 8207, HTSUS.

Holding:

The base metal "needles" for use with pneumatic scalers are classifiable under subheading 8207.90.60, HTSUS, which provides for interchangeable tools for hand tools, whether or not power operated . . . other interchangeable tools, and parts thereof: other: other: other: not suitable for cutting metal, and parts thereof: for hand tools and parts thereof.

Effect on other Rulings:

NY D83590 is REVOKED.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF FLAVORED SYRUPS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to tariff classification of certain flavored syrups.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of flavored syrups under the Harmonized Tariff Schedule of the United States (HTSUS). Customs is also revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published on December 27, 2000, in Volume 34, Number 52, of the CUSTOMS BULLETIN. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 17, 2001.

FOR FURTHER INFORMATION CONTACT: John G. Black, General Classification Branch, (202) 927-1317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke NY A85882 dated August 19, 1996, and to revoke any treatment accorded to substantially identical merchandise was published in the December 27, 2000 , CUSTOMS BULLETIN, Volume 34, Number 52. As explained in the notice published on February 21, 2001, in Vol. 35, No. 8 of the CUSTOMS BULLETIN , the period within which to submit comments on this proposal was extended to March 23, 2001. No comments were received in response to the notice.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

In NY A85882 dated August 19, 1996, Customs classified certain flavored syrups, which were said to contain over 10 percent but not over 65 percent, by dry weight, cane or beet sugar and were intended for sale to foodservice customers, under subheading 2106.90.95 and 2106.90.97, HTSUS, the in- and over-quota provisions for: Food preparations not elsewhere specified or included: ... Other: Articles containing over 10 percent by dry weight of sugar in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions.

It is now Customs position that certain flavored syrups, which fall into exception (a) of Additional U.S. Note 3 to Chapter 17, and are "prepared for marketing to the ultimate consumer in the identical form and package in which imported," are classified under subheading 2106.90.9972, HTSUS, which provides for: Food preparations not elsewhere specified or included: ... Other: Preparations for the manufacture of beverages: Containing sugar derived from sugar cane and/or sugar beets. (*See* the attachment to this document.)

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY A85882

and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 964265, set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: April 2, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

April 2, 2001
CLA-2 RR:CR:GC 964265 nel/JGB
Category: Classification
Tariff No. 2106.90.99

MR. JEAN MARC GALLERIE
P.O. Box 460003
Glendale, CO 80246

Re: Reconsideration of NY A85882; flavored syrup.

DEAR MR. GALLERIE:

This is in reply to your facsimile transmissions of May 18 and 30, 2000, requesting reconsideration of New York Ruling Letter (NY) A85882 dated August 19, 1996, which concerned the tariff classification of flavored, blended syrups under the Harmonized Tariff Schedule of the United States (HTSUS). We have reconsidered NY A85882 and believe that the classification set forth is incorrect.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY A85882 was published on December 27, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 52. As explained in the notice published on February 21, 2001, in Vol. 35, No. 8 of the CUSTOMS BULLETIN, the period within which to submit comments on this proposal was extended to March 23, 2001. No comments were received in response to this notice.

Facts:

The merchandise was described as "1883 de Philibert Routin" brand syrups, composed of liquid sucrose, liquid fructose, water, natural extracts, and flavors, put up in glass bottles containing 700 milliliters. All of the 21 different products, for which ingredient breakdowns were provided, were said to contain over 10 percent but not over 65 percent, by dry weight, cane or beet sugar and were

intended for sale to gourmet coffee and food distributors for use as flavoring ingredients in coffee, water, soda, ice cream, yogurt, pastries, and cocktails. All were classified in subheading 2106.90.95 or 2106.90.97, HTSUS, the in- and over-quota provisions for other food preparations not elsewhere specified or included, containing over 10 percent, by dry weight, of sugars derived from sugar cane and/or sugar beets.

In the request for reconsideration, it was stated that the imported product is sold in two markets in the United States: foodservice, as described in NY A85882, and at retail, to specialty food shops and supermarkets. Approximately 80 percent of the sales are to foodservice customers, and 20 percent are retail sales. Furthermore, the 700-ml bottle, regardless of the market in which it is sold, is the same product and bears the same label.

Issue:

Whether the Routin product syrups are "prepared for marketing to the ultimate consumer in the identical form and package in which imported" within the meaning of Section IV, Additional U.S. Notes 2(c) and (d), HTSUS.

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRIs). GRI 1, HTSUS, provides, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes[.]"

The HTSUS headings and subheadings under consideration are as follows:

2106	Food preparations not elsewhere specified or included:		
	Other:		
	***		
		Other:	
			Articles containing over 10 per cent by dry weight of sugar described in additional U.S. note 3 to chapter 17:
2106.90.95			Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions
2106.90.97			Other
2106.90.99		Other	

The Routin products were classified in subheading 2106.90.95/97, HTSUS, based on the information provided with the ruling request. These products conformed with all requirements of Additional U.S. Note 3 to Chapter 17, since they contained "over 10 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients," and did not fall into any of the exceptions provided for in that Note. Information provided at the time of the ruling request suggested the Routin goods were only sold to foodservice customers, a class of purchaser expressly excluded by Section IV, Additional U.S. Note 2(d) from consideration as an "ultimate consumer."

However, the request for reconsideration provided information regarding retail sales. The critical issue, the one relied upon in NY A85882, and that now compels modification of that ruling, is whether the merchandise fell into exception (a) of Additional U.S. Note 3 to Chapter 17, and was "prepared for marketing to the ultimate consumer in the identical form and package in which imported." This phrase is defined in Section IV, Additional U.S. Note 2(c) as meaning:

> ... the product is imported in packaging of such sizes and labeling as to be readily identifiable as being intended for retail sale to the ultimate consumer

without any alteration in the form or its packaging[.]

In the facts now provided, there is only one type of 700-ml bottle, and it is labeled in only one manner. That bottle, bearing that label, is sold to both foodservice and retail consumers. Retail sales comprise approximately 20 percent of the sales of the bottle. The sales to retail consumers are neither fugitive nor *de minimus*. The product meets exception (a) to Additional U.S. Note 3 to Chapter 17, and therefore is not specifically described in subheadings 2106.90.95 and .97, HTSUS. The Routin products are, in fact, "... imported in packaging of such sizes and labeling as to be readily identifiable for retail sale to the ultimate consumer." There is no requirement in Section IV, Additional U.S. Note 2(c) that the merchandise be sold principally to the ultimate consumer. What is required is that the imported package and label are of a type unmistakably intended for retail sales, and, when retail sales occur, the merchandise is, in fact, sold unaltered in the imported package.

Holding:

The Routin products in 700-ml bottles are properly classified in subheading 2106.90.9972, HTSUS, as: Food preparations not elsewhere specified or included ... Other: Preparations for the manufacture of beverages: Containing sugar derived from sugar cane and/or sugar beets. This provision is not subject to any sugar quota.

Effect on other Rulings:

NY A85882, dated August 19, 1996, is hereby REVOKED.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF PURADD FD-100, PREVIOUSLY KNOWN AS PLURADYNE FD-100

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to the tariff classification of PURADD FD-100, previously known as Pluradyne FD-100.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of PURADD FD-100, previously known as Pluradyne FD-100, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, Customs intends to revoke any treatment previously accorded by Customs to substantially identical

transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before May 18, 2001.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, (202) 927-2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of bulk importations of PURADD FD-100, previously known as Pluradyne FD-100. Although in this notice Customs is specifically referring to Customs Headquarters ruling (HQ) 956585, dated April 10, 1995, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise that may exist

but have not been specifically identified. Any party, who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importation of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions, or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importation of merchandise subsequent to this notice.

In HQ 956585, Customs ruled that PURADD FD-100, previously known as Pluradyne FD-100, was classified in subheading 3811.19.00, HTSUS, the provision for "[A]ntiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils: [A]ntiknock preparations: [O]ther". HQ 956585 is set forth as Attachment A.

The decision in this ruling was based on the understanding that PURADD FD-100 is used as an antiknock preparation. We now believe this statement is in error. Instead, the merchandise is classified in subheading 3811.90.00, HTSUS, which provides for "other" (than anti knock preparations or additives for lubricating oil), because it is formulated for use as a detergent additive for gasoline rather than as an antiknock preparation.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke HQ 956585, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQ 964310 (Attachment B to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: April 3, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

CLA-2 R:C:F 956585 K
Category: Classification
Tariff No. 3811.19.00

DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
1 East Bay Street
Savannah, Georgia 31401

Re: Application For Further Review of Protest No. 1703-94-100024; Pluradyne FD 100.

DEAR DISTRICT DIRECTOR:

The following is our response to the referral by your office received on June 20, 1994, of the request for further review of the above-referenced protest. A further submission by the protestant dated December 1, 1994, was received from your office by fax on December 13, 1994.

Facts:

The three consumption entries covering the imported Pluradyne FD 100 were liquidated between December 3, 1993, and January 28, 1994, under the provision for other synthetic coloring matter, subheading 3204.17.5090, Harmonized Tariff Schedule of the United States (HTSUS) (1993), with duty-at the general rate of 20 percent *ad valorem*. A timely protest under 19 U.S.C. 1514 was received on February 25, 1994. The protestant requested reliquidation of the entries under the provision for other thermosetting plastic polymers, subheading 3911.90.5050, HTSUS (1993), with duty at the general rate 2.2 cents per kg, plus 7.7 percent *ad valorem*. In a further submission to the protest dated December 1, 1994, the protestant requested reliquidation of the entries, under the provision for other polymers, subheading 3902.20.50, HTSUS (1993), with duty at the general rate of 2.2 cents per kg, plus 7.7 percent *ad valorem*. Your office is now of the opinion that the merchandise is classifiable under the provision for other antiknock preparations, subheading 3811.19.00, HTSUS (1993), with duty at the general rate of 3.7 cents per kg, plus 13.6 percent *ad valorem*.

A Customs laboratory report for a sample of the imported merchandise indicates that it is a clear colorless viscous liquid, a mixture containing in part several saturated Hydrocarbons and Poly (Isobutylene) Amine. The report concludes that the merchandise is an additive for mineral oils (including gasoline) or for other liquids used for the same proposes as mineral oils.

In respect of one entry, dated September 9, 1993, protestant states that the amount stated on the commercial invoice (no. 0506411) was incorrect to the extent that it reflected an overcharge on the unit price of the imported merchandise, and contends that transaction value should be adjusted accordingly. In support of this protestant has submitted a credit memorandum, dated October 20, 1993, setting forth an adjustment to the price of the imported merchandise per invoice no. 0506411. However, since the credit memorandum was prepared after the merchandise was imported into the United States, it is the position of your office that the adjustment.should be disregarded.

Issues:

(1) The issue concerns the proper classification of the merchandise briefly described above.

(2) The issue concerns whether the post-importation adjustment to the price actually paid or payable was properly disregarded for purposes of determining transaction value.

Law and Analysis:

Heading 3811, HTSUS (1993), provides for antiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils. Based upon the limited information submitted and the Customs laboratory report, we are of the opinion that the merchandise is a fuel additive preparation Classifiable in subheading 3811.19.00, HTSUS (1993).

Merchandise imported into the United States is appraised in accordance with section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. § 1401a). The preferred basis of appraisement under the TAA is transaction value, defined as the "price actually paid or payable for the merchandise when sold for exportation to the United States" plus, to the extent applicable, certain statutorily enumerated additions thereto. The protested merchandise was appraised under transaction value.

As a general matter, we note that merchandise will be appraised under transaction value only if, *inter alia*, the buyer and seller are not related, or if related, transaction value is acceptable under section 402(b)(2)(B) of the TAA. 19 U.S.C. § 1401a(b)(2)(A). In the instant case the protestant/buyer and the seller are related; but since no information has been presented to indicate that the relationship influenced the price actually paid or payable, we have assumed for purposes of this decision that transaction value is in fact the appropriate basis of appraisement.

The protestant maintains that the price actually paid or payable should be adjusted in respect of the seller's credit memorandum of October 20, 1993. However, section 402(b)(4)(B) of the TAA provides that "[a]ny rebate of, or other decrease in, the price actually paid or payable ...made or otherwise effected between the buyer and seller after the date of the importation of the merchandise into the United States shall be disregarded in determining... transaction value." Based on the information submitted, the adjustment to the price actually paid or payable was effected after the date of importation. Accordingly, it should not be taken into account in determining transaction value. *E.g.*, Headquarters Ruling Letter 543246, dated January 9, 1984.

Holdings:

(1) The product known as Pluradyne FD 100, is classified as other antiknock preparations for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils, in subheading 3811.19.00, HTSUS (1993), with duty at the general rate of 3.7 cents per kg, plus 13.6 percent *ad valorem*.

(2) The post-importation adjustment to the price actually paid or payable was properly disregarded in determining transaction value.

You are directed to deny the protest in full except to the extent that reclassification as indicated above results in a partial allowance.

In accordance with Section 3A(11)(b) of Customs Directive 099 3550-065, Revised Protest Directive, dated August 4, 1993, a copy of this decision attached to Customs Form 19, Notice of Action, should be provided by your office to the protestant no later than 60 days from the date of this decision and any reliquidations of entries in accordance with this decision must be accomplished prior thereto. Sixty days from the date of this decision the Office of Regulations and Rulings will take steps to make this decision available to Customs personnel via the Customs Subscription Service, Freedom of Information Act and other public access channels.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

CLA-2 RR:CR:GC 964310 AM
Category: Classification
Tariff No. 3811.90.00

MR. JAMES S. O'KELLY
BARNES, RICHARDSON & COLBURN
475 Park Ave. South
New York, N.Y. 10016

Re: HQ 956585 revoked; PURADD FD-100, previously known as Pluradyne FD-100.

DEAR MR. O'KELLY:

This is in reference to your letter of June 21, 2000, on behalf of BASF Corporation, requesting reconsideration of HQ 956585, dated April 10, 1995, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of PURADD FD-100. In HQ 956585, it was determined that Pluradyne FD-100 was classifiable in subheading 3811.19.00, HTSUS, which provides for "[A]ntiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils: [A]ntiknock preparations: [O]ther." You state that PURADD FD-100 is the new name for Pluradyne FD-100, but that the two products are chemically the same.

We have reconsidered HQ 956585, and the additional information contained in your submissions, dated January 10, 2001, and February 15, 2001. We have also considered arguments you presented in a meeting at U.S. Customs Headquarters on February 22, 2001. We find the classification for the subject merchandise in HQ 956585 to be incorrect. The merchandise is not an antiknock preparation, rather, it is a gasoline detergent. Accordingly, the correct classification for the merchandise is subheading 3811.90.00, the provision for "[A]ntiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils: [O]ther."

Facts:

The subject merchandise is PURADD FD-100 (the same merchandise as the subject of HQ 956585, Pluradyne FD-100). PURADD FD-100 is a clear, colorless, viscous liquid mixture consisting of about 52% polyisobutylene amine (PIB-CH2-NH2, hereinafter "PIB amine") and several saturated hydrocarbons or paraffinic solvent. The sole use of this product is as gasoline detergent. After entry into the United States, the merchandise is blended with carrier oil, and anti-corrosive and other ingredients to produce a final product consisting of approximately 26%–40% PIB amine. This final multi-purpose product is called PURADD AP-97 and is sold to gasoline suppliers as a detergent additive for mixing into their gasoline in accordance with regulations of the Environmental Protection Agency (EPA). (40 CFR §80.140 *et seq.*).

Polyisobutenamines are used as gasoline detergent additives. Ullmann's Encyclopedia of Industrial Chemistry, states:

> The development of second-generation detergent additives made it possible to keep the hot inlet valve clean. Long-chain, high molecular mass alkyl compounds with a polar end group are very effective. . . . Effective second-generation additives are, for example, **polyisobutenamines,** polyisobutenepolyamides, or long-chain carboxylic acid amines. These detergents are frequently used in combination with very thermally stable carrier oils that keep the surface of the valve lubricated and ensure continuous flowing off of deposit particles. Ullmann's Encyclopedia of Industrial Chemis-

try, v. A16, 5th ed., p. 735.

Second-generation gasoline detergent additives such as polyisobutylamines have a mode of action analogous to that of corrosion inhibitors. Mechanistically, the polar end of the molecule (*e.g.*, amine group) is attached to the metal surface; while a nonpolar, high molecular mass alkyl chain at the other end of the molecule (polyisobutylene) extends into the hydrocarbon fuel. *Id.* at p. 733. The surface activity of the polar groups ensures the formation of a protective film, whereas the dispersing effect of the polymer component inhibits agglomeration and deposit formation by smaller particles. In this way the carburetor and the inflow and outflow of the cylinders are "kept clean". *Id.* at p. 737.

In support of your argument that PURADD FD-100 cannot be used as an additive for gasoline, you submit the results of a "VW (volkswagen) Vasser Boxer Inlet Valve Sticking Test CEC F-16-T-96" which runs a Volkswagen 1.9 liter 44 kW water-cooled-boxer Otto engine of VW type 2 series three times through 13 cycles and allows it to cool down. If, at that time, the engine compression is less than 8 bar, then the inlet valve was sticking in the valve guide. PURADD FD-100 failed this test in the VW engine.

Issue:

What is the classification of PURADD FD-100, under the HTSUS.

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

GRI 2(b) requires that goods consisting of different materials be classified according to the principles of GRI 3. GRI 3(a) requires that amongst competing headings, the most specific heading be used, but headings which refer to part only of the goods are equally specific. up of different components, shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The following HTSUS provisions are relevant to the classification of this product:

3811	Antiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils:	
	Antiknock preparations:	
*	* * * * *	
3811.19.00		Other [than based on lead compounds]

* * * * *

3811.90.00	Other [than anti-knock preparations or additives for lubricating oil]

* * * * * * * * * *

3902	Polymers of propylene or of other olefins, in primary forms:
3902.20	Polyisobutylene:
3902.20.50	Other [than Elastomeric]

The EN to heading 3811, HTSUS, defines detergent additives for gasoline as "[P]reparations used to keep the carburetor and the inflow and outflow of the cylinders clean." EN 38.11, 2(d).

The EN to the Chapter Notes for chapter 39 state, in pertinent part, "[W]hen as a result of the addition of certain substances, the resultant products answer to the description in a more specific heading elsewhere in the Nomenclature, they are **excluded** from Chapter 39; this is, for example, the case with: . . (b) Prepared additives for mineral oils (**Heading 38.11**)." ENs p. 597.

Chapter note 2 to Chapter 39 excludes from classification within chapter 39, in pertinent part, the following:

> (d)Solutions (other than collodions) consisting of any of the products specified in headings 3901 to 3913 in volatile organic solvents when the weight of the solvent exceeds 50 percent of the weight of the solution (heading 3208); . .

Heading 3811, HTSUS, is a principal use provision whereas heading 3902, HTSUS, is a descriptive provision. "A provision which describes an importation by its use is more specific than one which provides for an importation by general description." *E.M. Chemicals v. U.S.*, 728 F. Supp 723, 727 (1989). Therefore, if heading 3811, HTSUS, describes the merchandise, it is the correct heading to use for classification of PURRADD FD-100. Furthermore, if heading 3811, HTSUS, describes the merchandise, it is specifically excluded from classification in heading of 3902, HTSUS, under the EN's to Chapter 39, p. 597.

In *Mitsui Petrochemicals v. United States*, 21 C.I.T. 882 (1997, Ct. Intl. Trade Lexis 110; Slip Op. 87–108), the court held that a copolymer of heading 3902 was more specifically described in heading 3811 where the **sole use** of the imported substance was as a viscosity improver. *Id.* at 887 (emphasis added). The court in *E.M. Chemicals v. United States*, 20 C.I.T. 382, 923 F. Supp. 202 (1996 Ct. Intl. Trade) explained the application of principal use provisions thus:

> When applying a "principal use" provision, the Court must ascertain the class or kind of goods which are involved and decide whether the subject merchandise is a member of that class. *See supra* Additional US Rule of Interpretation 1 to the HTSUS. In determining the class or kind of goods, the Court examines factors which may include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale (*e.g.*, the manner in which the merchandise is advertised and displayed); (5) the usage of the merchandise; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use. *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377, cert. denied, 429 U.S. 979, 50 L. Ed. 2d 587, 97 S. Ct. 490 (1976); *see also Lenox Coll.*, 20 C.I.T., Slip Op. 96–30, at page 5.

Applying the *Carborundum* factors above, a formulated preparation containing PIB-amine and paraffinic solvent has the general physical characteristics of a

gasoline detergent additive preparation in that it is a preparation used to keep the carburetor and the inflow and outflow of the cylinders clean. The fact that the addition of a carrier oil optimizes the merchandise for use over time, in very small engines, like that used in the Wasser-Boxer test, does not change its basic formulation as a gasoline detergent preparation consisting of the active ingredient, PIB-amine. (*See Ullmanns, supra*). Moreover, the merchandise performs the cleaning function by coating the fuel inlet system, making it less amenable to deposit build-up. *Id.* The fact that the preparation coats the intake valve proves that the merchandise is performing as a detergent to "keep the carburetor and the inflow and outflow of the cylinders clean." The ultimate purchaser, gasoline suppliers, expect that the product will perform as a gasoline detergent in their gasoline. No evidence has been submitted that proves that the imported product could not perform as a gasoline detergent in the U.S. Gasoline detergents move through blending plants to gasoline suppliers as does the instant merchandise. The merchandise, once fully blended, is tested and advertised as a gasoline detergent. PIB amine formulations are recognized and used as gasoline detergents. Furthermore, the **sole use** for the imported PIB-amine formulation is a gasoline detergent. (*See Mitsui, supra*). Hence, the merchandise belongs to the class or kind of goods that are principally used as fuel additives and are therefore classifiable in heading 3811 using GRI 1.

Merchandise consisting of a blend of PIB amine and paraffinic solvent has the essential character of a gasoline detergent. While chapter note 2 to chapter 39 would not specifically exclude this blend from classification in the chapter, this does not mean that the instant merchandise is automatically included in heading 3902 using GRI 1. To the extent that heading 3902 describes the PIBA in the solution, heading 3902 describes part only of the imported substance. Therefore, an analysis of the ingredients using GRI 2(b) and GRI 3 to determine classification of this composite good is unwarranted because the composite good is formulated for use as a detergent gasoline additive classified in heading 3811, HTSUS, using GRI 1.

Moreover, a paraffinic solvent has been added to the PIB to produce PIB-Amine and remains in the imported product in order to create a product which is defined in the technical literature as a gasoline detergent additive. As explained above, the merchandise is therefore more specifically described in heading 38.11 and excluded from classification in Chapter 39 under the EN.

At GRI 6, between subheadings 3811.19.00, HTSUS, the provision for antiknock preparations, and subheading 3811.90.00, HTSUS, the provision for other gasoline additives, the merchandise is classified in subheading 3811.90.00, HTSUS, because it is formulated for use as a detergent additive for gasoline rather than as an antiknock preparation.

Holding:

PURADD-FD-100, previously known as Pluradyne FD-100, is classified at GRI 1 in subheading 3811.90.00, the provision for "[A]ntiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils: [O]ther."

Effect on other Rulings:

HQ 956585 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN MATHEMATICAL TEACHING AIDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of a ruling letter and revocation of treatment relating to the classification of certain mathematical teaching aids.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of certain mathematical teaching aids, and is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the action was published on February 28, 2001, in Vol. 35, No. 9, of the CUSTOMS BULLETIN. No comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 17, 2001.

FOR FURTHER INFORMATION CONTACT: Benjamin J. Bornstein, General Classification Branch: (202) 927-2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable

legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(1)), by section 623 of Title VI, a notice was published on Februry 28, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 9, proposing to modify one ruling, NY 878668, dated October 7, 1992, and revoke the tariff treatment pertaining to the tariff classification of certain mathematical teaching aids, specifically "Base Ten Blocks" and "Color Tiles." No comments were received in response to this notice.

As stated in the proposed notice, this modification and revocation of treatment will cover any rulings on this merchandise that may exist but which have not been specifically identified. Any party who has received an interpretative ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY 878668 and any other ruling not specifically identified to reflect the proper classification of certain mathematical teaching aids: "Base Ten Blocks" and "Color Tiles," pursuant to the analysis set forth in Headquarter's Ruling Letter (HQ) 964363. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: April 2, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

April 2, 2001
CLA-2 RR:CR:GC 964363 BJB
Category: Classification
Tariff No. 3920.10.00; 3926.10.00

MS. CORINNE DARNELL
THE HIPAGE COMPANY
Greensboro Business Park
532 North Regional Road, Suite D, 27409
Greensboro, NC 27425

Re: Math Teaching Aids; NY 878668 Modified.

DEAR MS. DARNELL:

This is in reference to NY 878668, which the Director of Customs National Commodity Specialist Division, New York, issued to The Hipage Company on October 7, 1992, in response to a letter of September 22, 1992, on behalf of U.S. Worldwide Inc. This ruling concerned the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of "'Attribute Blocks,' 'Base Ten Blocks,' 'Coins,' 'Color Tiles' and 'Counters,'" described as articles used to teach children to count, recognize shapes and name colors.

We have reviewed the decision in NY 878668 and have determined that the classification of the "Base Ten Blocks" and the "Color Tiles" are in error. This ruling modifies NY 878668 with respect to the "Base Ten Blocks" and the "Color Tiles."

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(1)), by section 623 of Title VI, a notice was published on February 28, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 9, proposing to modify NY 878668, dated October 7, 1992, and to revoke the tariff treatment pertaining to the tariff classification of certain mathematical teaching aids: "Base Ten Blocks" and "Color Tiles." No comments were received in response to this notice.

Facts:

According to information provided with the letter of September 22, 1999, the merchandise referred to as "Base Ten Blocks," and "Color Tiles," are used primarily by teachers in elementary schools, to demonstrate "base ten" and metric concepts in mathematics. The Base Ten Blocks are packaged in an assortment including each of the following: (1) 30 single units (place value ones) measuring one centimeter in each dimension; (2) 20 rods (place value tens – bars) measuring one centimeter by one centimeter by ten centimeters, with slight indentations on each bar's surface dividing each bar into ten equal one centimeter units; and (3) 2 flat, square plates (place value 100s) measuring ten centimeters by ten centimeters by one centimeter, with slight indentations on the surface dividing each plate into one hundred units. Each of the units in the place value tens and place value 100s is the size of the place value one cube unit. The "Base Ten Blocks" are all made of clear plastic for use on an overhead projector in a classroom situation. A sample of each of the components of the "Base Ten Blocks" assortment was provided. The place value 10s – bars, and the place value 100s – square plates, are both essentially flat in appearance.

The "Color Tiles" are an assortment of one-inch square tiles in ten different colors. They are all made of plastic. There are approximately 50 tiles to a package. The tiles are used both in, and out of, a classroom situation to teach a variety of mathematical concepts, including: "counting, estimation, whole number computation, fractions, patterns, geometry, [and] graphs[.]"

In NY 878668, the "Base Ten Blocks" and the "Color Tiles" were classified under subheading 3926.10.00, HTSUS, which provides for "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Office or school supplies."

Issue:

Whether the "Base Ten Blocks" and "Color Tiles" are classifiable under subheading 3926.10.00, HTSUS, as "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Office or school supplies."

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). Under General Rule of Interpretation (GRI) 1, HTSUS, goods are to be classified according to the terms of the headings and any relative section or chapter notes, provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. Customs believes the ENs should always be consulted. *See* T.D. 98–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS headings under consideration are as follows:

3920	Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials.
3920.10.00	Of polymers of ethylene
3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
	* * * * *
3926.10.00	Office or school supplies
	* * * * *
9023	Instruments, apparatus and models, designed for demonstrational purposes (for example, in education or exhibitions), unsuitable for other uses, and parts and accessories thereof .....:
	* * * * *

Note 2(r), Chapter 39, HTSUS, states that the chapter does not cover: "[a]rticles of chapter 90 (for example, optical elements, spectacle frames, drawing instruments)[.]" Therefore, if the "Base Ten Blocks" and "Color Tiles" are goods classifiable under heading 9023, they cannot be classifiable under headings 3920 or 3926, HTSUS.

The ENs to heading 9023, provide a list of eleven examples of instruments, apparatus and models designed for demonstrational purposes. All of the examples provided are complex and sophisticated articles, including "(1) [s]pecial demonstrational machines or appliances . . . , (3) [t]raining dummies, constituting an inflatable life-size model of the human body with artificial respiratory parts reproducing those of a human being, (6) [m]odels, etc., for artillery training, used in training courses held indoors, and (11) [m]ilitary tank simulators which are used for the training . . . of tank drivers."

"Base Ten Blocks" and the "Color Tiles" are used as instructional aids to teach mathematical counting concepts. Although counting is fundamental to mathematics, and mathematical principles are often complex, neither the "Base Ten Blocks" nor the "Color Tiles" rise to the level of complexity nor sophistication exhibited by the examples provided in the ENs to heading 9023. While examples of

models are provided in the ENs, the term "model" is not defined in the section or chapter notes or in the ENs for heading 9023.

In the absence of a contrary legislative intent, tariff terms that are not defined in an HTSUS section or chapter note, or clearly described in an EN, are construed in accordance with their common and commercial meanings, which are presumed to be the same. *Nippon Kogasku (USA) Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Dictionaries, scientific authorities and other reliable lexicographic sources are often consulted; and, where the term under consideration is technical in nature, appropriate technical sources of information should be consulted. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

In this case, a typical definition of the term "model" is "a small copy or imitation of an existing object, as a ship, building, etc., made to scale;" "a preliminary representation of something, serving as the plan from which the final, usually larger, object is to be constructed;" or "a hypothetical description, often based on an analogy, used in analyzing or explaining something . . .." (Webster's New World Dictionary, 3rd College Ed., 1988, p. 871.) These definitions support the proposition that a "model" involves an intricate structure, or is a representation of a complex hypothetical or other difficult concept otherwise too complex to understand by mere explanation, analogy, or simple analysis. Counting in base ten with small pieces of plastic or with plastic cubes, bars or squares, is neither a complicated task nor a sophisticated procedure.

Moreover, both articles are sold in packets containing relatively small numbers of the merchandise. Thus, either article could readily be purchased by teachers or parents, and used either in school or in the home. The articles are not limited in their use as a teacher's instructional aid solely suitable on an overhead projector in the classroom. We are of the opinion that neither the "Base Ten Blocks," nor the "Color Tiles," are described by heading 9023, HTSUS.

With respect to the potential applicability of heading 3920, HTSUS, Note 10, Chapter 39, states that, "[i]n headings 3920 and 3921, the expression *"plates, sheets, film, foil and strip"* applies only to plates, sheets, film, foil and strip (other than those of Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use)." All three components of the "Base Ten Blocks" and all of the "Color Tile" pieces are essentially flat and rectangular or square geometric in form.

The ENs to heading 3920, HTSUS, in pertinent part state, "[a]ccording to Note 10 to this Chapter, the expression "plates, sheets, film, foil and strip" applies only to plates, sheets, film, foil and strip and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked (for example, polished, embossed, coloured, merely curved or corrugated), uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use, for example, tablecloths). Although indentations appear on two components of the "Base Ten Blocks," on the place value 10s – bars and on the place value 100s – squares, these superficial markings do not constitute "further working," and therefore do not change their nature. The indentations are formed during the molding process and not after the formation of the plate. Thus, even though "[p]lates, sheets, etc., whether or not surface-worked (including squares and other rectangles cut therefrom), with ground edges, drilled, milled, hemmed, twisted, framed or otherwise worked or cut into shapes other than rectangular (including square) are generally classified as articles of **headings 39.18, 39.19 or 39.22 to 39.26**[,]" (EN 39.20, p. 619), these components are not "further worked" and retain their essentially flat shape and are thus, classifiable under heading 3920, HTSUS. On the condition that the articles are made of an ethylene polymer, they are provided for under subheading 3920.10, HTSUS, which covers "[o]ther plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials. Of polymers of ethylene[.]" *See* NY C81577 dated November 28, 1997, and NY F83529 dated March 24, 2000, for similar rulings.

The ENs to heading 3926, HTSUS, emphasize in pertinent part, that heading

3926 only covers "articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter [39]) or of other materials of headings 39.01 to 39.14." Because the "Base Ten Blocks" and the "Color Tiles" are provided for under heading 3920, HTSUS, they are therefore excluded from consideration under the more general "basket provision" of heading 3926, HTSUS, as "[o]ther articles of plastics . . . ."

In NY 878668, the "Base Ten Blocks" and the "Color Tiles" were held to be classifiable under subheading 3926.10.00, HTSUS, based upon the understanding that they were articles made of plastic and used as a school supply. However, at GRI 1, only once a determination is reached as to which HTSUS heading covers these articles would further reference be made to the 6-digit subheading level.

Holding:

At GRI 1, the "Base Ten Blocks" and "Color Tiles" are classifiable under subheading 3920.10.00, HTSUS, which provides for "[o]ther plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials. Of polymers of ethylene[.]"

Effect on other Rulings:

NY 878668, dated October 7, 1992, is hereby MODIFIED with respect to the "Base Ten Blocks" and the "Color Tiles," as set forth herein. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

James L. Watson
Herbert N. Maletz
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg*

Clerk

Leo M. Gordon

* Effective April 1, 2001.

Decisions of the United States Court of International Trade

(Slip Op. 01–34)

USEC, INC. AND UNITED STATES ENRICHMENT CORPORATION, PLAINTIFFS, AND AD HOC COMMITTEE OF DOMESTIC URANIUM PRODUCERS, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND THE GOVERNMENT OF KAZAKHSTAN, NATIONAL ATOMIC COMPANY KAZATOMPROM, AND NUKEM, INC., DEFENDANT-INTERVENORS

Consol. Court No. 99–08–00547

[Plaintiffs' Motion for Rehearing and Modification of decision denied.]

(Decided March 29, 2001)

Steptoe & Johnson LLP, Richard O. Cunningham, (Sheldon E. Hochberg), Eric C. Emerson, Shannon P. MacMichael, for Plaintiffs USEC Inc., and United States Enrichment Corporation.

(Lyn M. Schlitt), General Counsel, *Marc A. Bernstein*, Acting Assistant General Counsel, *Michael K. Haldenstein*, Office of General Counsel, U.S. International Trade Commission, for Defendant.

Shearman & Sterling, (Thomas B. Wilner), for Defendant-Intervenors the Republic of Kazakhstan and the National Atomic Company Kazatomprom.

White & Case, LLP, (Carolyn B. Lamm), Adams C. Lee, Christina C. Benson, for Defendant-Intervenor NUKEM, Inc.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

BARZILAY, *Judge*: This matter is before the court pursuant to Plaintiffs' USEC Inc. and United States Enrichment Corporation (collectively, "USEC") Motion for Reconsideration brought under USCIT R. 59.[1] Plaintiffs request that the court reconsider its decision in the above-captioned case denying USEC's Motion for Judgment on the Agency Record, reverse its decision in Slip Opinion 01–08, dated January 24, 2001 ("Opinion") and remand the matter to the International Trade Commission ("ITC" or "Commission") for further consideration of its analysis of material injury or threat thereof.[2] In its previous Opinion, the court held that the ITC's final negative determination in

[1] Plaintiff Ad Hoc Committee of Domestic Uranium Producers did not participate in this proceeding.

[2] Familiarity with the Opinion is presumed.

Uranium from Kazakhstan, 64 Fed. Reg. 40897 (July 28, 1999), in which the Commission ascertained that uranium imported from Kazakhstan caused neither material injury nor threat of material injury to the domestic uranium industry, was supported by substantial evidence and in accordance with law. According to USEC, the court's determination that the Department of Commerce ("Department" or "Commerce") did not consider the inventory of uranium enriched in Russia but located in Kazakhstan ("Kazakh Stockpile" or "Stockpile") to be of Kazakh origin is "flatly contradicted" by recent statements from the Department. *Mem. of P. & A. in Supp. of USEC's Mot. for Reh'g and Modification of this Court's Decision of January 24, 2001* ("*Pls.' Mem.*") at 4. As such, USEC contends, the court erred in determining that the Commission was correct in excluding the Stockpile from its injury determination. *See id.* For the reasons stated herein, the motion is denied and the original judgment is affirmed in all respects.

II. Discussion

The grant or denial of a motion for rehearing and modification under USCIT R. 59 lies within the sound discretion of the court. *MITA Copstar America, Inc. v. United States*, 22 CIT ___, ___, 994 F. Supp. 393, 394 (1998); *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT ___,___, 19 F. Supp.2d 1116, 1118 (1998). Several principles guide the court in determining whether reconsideration is warranted. A rehearing is not granted to allow a losing party to relitigate a case, but rather to address a fundamental or significant flaw in the original proceeding. *See Asociation*, 22 CIT at ___, 19 F. Supp. 2d at 1118 (citing *St. Paul Fire & Marine Ins. Co. v. United States*, 16 CIT 984, 984, 807 F. Supp. 792, 793 (1992)). Furthermore, a court's previous decision will not be disturbed unless it is "manifestly erroneous." *Mita Copystar*, 22 CIT at ___, 994 F. Supp. at 394 (citing *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 337, 601 F. Supp. 212, 214 (1984)(quoting *Quigley & Manard, Inc. v. United States*, 496 F. 2d 1214, 1214 (1974))). The circumstances in which a "significant flaw" or "manifestly erroneous" decision is present are:

> (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in a nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case.

Id. (citing *Gold Mountain*, 8 CIT at 336–337; 601 F. Supp. at 214). USEC has not persuaded the court that any of the established grounds for reconsideration of its decision are present in this case.

USEC bases its request for reconsideration of the Stockpile issue on a January 19, 2001, letter from Secretary of Commerce Norman

Mineta to Senator Mitch McConnell ("Mineta letter") regarding Commerce's scope inquiry into the Stockpile. First, as Defendant correctly notes, USEC is asking the court to consider documents that were not part of the administrative record in this case. Under the appropriate standard of review of an injury determination, the court determines whether the Commission's decision is supported by substantial evidence on the record or is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(1994). Recognizing that the court may not consider the Mineta letter as part of the administrative record, Plaintiffs ask the court to take judicial notice of the letter pursuant to Rule 201(d) of the Federal Rules of Evidence, which provides: "[a] court shall take judicial notice if requested by a party and supplied with the necessary information."

Rule 201(b) of the Federal Rules of Evidence states: "a judicially noticed fact must be one not subject to reasonable dispute." The two facts that plaintiffs contend are presented by the Mineta letter are (1) that the Department approved shipments of uranium from the Stockpile while the Russian Suspension Agreement was still in effect, and thus treated the Stockpile "*de facto*. . . as Kazakh-origin uranium;" and (2) that the Department has not yet clarified its original scope determination regarding the Stockpile. *See USEC Br.* at 8; *Mem. of P. & A. in Supp. of the Resp. of NUKEM to USEC's Mot. for Rehearing and Modification of this Court's decision of January 24, 2001* ("NUKEM Br.") at 5. The issue of the origin of the uranium from the Stockpile is a central legal issue in this case. The court agrees with Defendant-Intervenor NUKEM and Defendant that "the Mineta Letter and the inferences drawn therefrom are *not facts at all*;" but that Plaintiffs seek to introduce the letter "to prove facts that are not indisputable. . . ." *See NUKEM Br.* at 9; *Def.'s Br.* at 6. The court declines to deem contentious points of law undisputed facts, and therefore refrains from taking judicial notice of the letter.

Even if the court were to determine that the letter indeed contained indisputable facts and that it could appropriately take judicial notice of the letter, the court agrees with Defendant that the letter itself provides no important new evidence warranting reconsideration. The letter indicates that the Department had not reached a determination in the scope inquiry regarding the Stockpile, and that a substantial quantity of enriched uranium from Kazakhstan entered the United States. This "evidence" is neither new nor important, but "merely cumulative information reasserting the same facts asserted by Plaintiffs at the Commission and again before this court." *NUKEM Br.* at 4. The court recognized in its Opinion that shipments of uranium from the Kazakh Stockpile had been imported into the U.S. while the suspension agreement was pending, and that the Department had not yet issued a final determination regarding the formal scope inquiry into the origin of the Kazakh Stockpile. *See Opinion* at 5, n. 7. Yet, these facts did not affect the court's ability to determine whether the Commission's determination was supported by substan-

tial evidence and in accordance with law. *See Opinion* at 5.

As the court previously stated, "Plaintiffs are not entitled to judicial review of the DOC's scope determination, but may only raise the issue of whether the ITC has correctly construed the scope determination. . . ." *Opinion* at 14. Plaintiffs are attempting to convince the court to reconsider its decision, based on confirmation of the fact that the question of the Stockpile's origin has not been resolved by Commerce. *See Pls.' Br.* at 9–10. The court sees no important difference between the facts before the court at the time of the Opinion and the facts contained in the Mineta letter. The court can find no reason to reconsider its previous opinion that the Commission's determination was supported by substantial evidence and in accordance with law.

In accordance with the applicable standard of review and for the foregoing reasons, it is hereby

ORDERED that Plaintiffs' Motion for Rehearing and Modification of the court's decision is DENIED; and it is further

ORDERED that the court's opinion in Slip Op. 01–08, dated January 24, 2001, is affirmed in all respects.

[PUBLIC VERSION]

(Slip Op. 01–35)

CHEMETALS, INCORPORATED, AND KERR-MCGEE CHEMICAL LLC, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TOSOH HELLAS A.I.C., DEFENDANT-INTERVENOR

Court No. 99–12–00741

[ITA's antidumping determination affirmed.]

(Dated March 30, 2001)

Gardner, Carton & Douglas LLC (*W.N. Harrell Smith, IV*), and *Squire, Sanders & Dempsey, LLP* (*Ritchie T. Thomas*) for plaintiffs.

Stuart E. Schiffer, Deputy Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Erin E. Powell*), *Augusto Guerra*, Office of General Counsel, United States Department of Commerce, of counsel, for defendant.

Weil, Gotshal & Manges, LLP (*A. Paul Victor* and *J. Scott Maberry*) for defendant-intervenor.

OPINION

RESTANI, *Judge*: This matter is before the court on a motion for judgment on the agency record pursuant to USCIT Rule 56.2, brought by Kerr-McGee Chemical LLC and Chemetals, Inc. (collectively, "Plaintiffs"), the petitioners in the underlying antidumping administrative

review. At issue is *Electrolytic Manganese Dioxide from Greece*, 64 Fed. Reg. 62,169 (Dep't comm. 1999) (final admin. rev.) [hereinafter "*Final Results*"]. Plaintiffs contest the selection of home market sales for price comparison purposes. Plaintiffs also contend that inventory carrying costs should not have been included in calculating constructed export price ("CEP").

JURISDICTION & STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations and reviews, the Court will hold unlawful those agency determinations that are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

FACTUAL & PROCEDURAL BACKGROUND

During the period of review ("POR"), April 1, 1997, through March 31, 1998, Tosoh Hellas AIC ("Tosoh") sold only Electrolytic Manganese Dioxide ("EMD"), an intermediate product used in the production of dry cell batteries. During this period, Tosoh produced and exported EMD to the United States, though of a grade different from that sold in the home market.[1]

In March of 1989, Commerce determined that EMD from Greece was being sold at less than fair value in the United States. *Electrolytic Manganese Dioxide from Greece*, 54 Fed. Reg. 8,771 (Dep't Comm. 1989) (final determ.) ["*EMD from Greece*"]. In *EMD from Greece*, Commerce determined that zinc-chloride and alkaline grade EMD were "similar" merchandise because "the two [grades] of EMD are produced in the same production process and differ only in their final finishing"; there was minimal cost difference between the products; and both grades were used in the production of dry-cell batteries. *Id.* at 8773. Commerce also determined that "respondent's combined home market sales of alkaline and zinc-chloride grade EMD are adequate as a basis of comparison since these sales exceed five percent of sales of that merchandise to third countries." *Id.*

Plaintiffs sought judicial review of the determination in *EMD from Greece* regarding the issues of product comparability and home market viability. *Kerr-McGee Chem. v. United States*, 14 CIT 422, 741 F. Supp. 947 (1990). There, the court affirmed Commerce's viability analysis and its determination that the two grades of EMD were "similar" under the then-applicable like product provision of the statute. *Id.*, 14 CIT at 426–31, 741 F. Supp. at 952–56.

On April 29, 1998, THA requested that Commerce initiate the administrative review of EMD from Greece. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for*

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[1] These included the following grades: (1) a [ ] grade EMD manufactured using one subtype of an input, namely [ ] and (2) [ ] grade EMD manufactured using another subtype of an input, namely [ ]. In the period of review, Tosoh sold in the home market only the [ ] EMD and exported to the United States only the [ ] grade EMD.

Revocations in Part, 63 Fed. Reg. 29,370 (Dep't Comm. 1998). Commerce found that the home market product qualified as a "foreign like product," that the home market was viable pursuant to the five percent viability test, and that a "particular market situation" did not exist to warrant departure therefrom. *Final Results*, 64 Fed. Reg. at 62,170–73. Plaintiffs appealed the *Final Results* to this court.

On May 17, 2000, the United States International Trade Commission published the results of its five-year (sunset) review of the antidumping orders against EMD from Greece and Japan, finding that revocation of the antidumping duty orders "would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." *Electrolytic Manganese Dioxide from Greece and Japan*, 65 Fed. Reg. 31,348, 31,348 (Int'l Trade Comm'n 2000) (sunset rev.). On May 31, 2000, Commerce revoked the antidumping orders against EMD from Greece and Japan, effective January 1, 2001. *Electrolytic Manganese Dioxide from Greece and Japan*, 65 Fed. Reg. 34,661 (Dep't Comm. 2000) (revocation). Notwithstanding the revocation, Plaintiffs maintain the appeal of the Final Results.[2]

Discussion

Plaintiffs challenge the *Final Results* on three grounds. First, Plaintiffs claim that Commerce's determination of "foreign like product" under 19 U.S.C. § 1677(16)(B) is not supported by substantial evidence and is otherwise not in accordance with law. Second, Plaintiffs contend that (a) the low volume of U.S. sales relative to sales worldwide warrants a departure from application of the test for home market viability under 19 U.S.C. § 1677b(a)(1), and (b) a "particular market situation" renders Tosoh Greece's home market sales an inadequate basis for comparison. Third, Plaintiffs claim that inventory carrying costs were associated with economic activities occurring in the United States and therefore should have been included in calculating constructed export price.

I. *Foreign Like Product*

In the *Final Results*, Commerce concluded that the EMD Tosoh sold in Greece is a "foreign like product" on which normal value can be based under 19 U.S.C. § 1677(16)(B).[3] 64 Fed. Reg. at 62,171. Plain-

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[2] No party has argued that the revocation rendered the *Final Results* moot. Whether duties are owed for the review period at issue remains an open issue.

[3] 19 U.S.C. § 1677(16) reads in relevant part:

(16) Foreign like product

The term "foreign like product" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
(B) Merchandise–
(i) produced in the same country and by the same person as the subject merchandise,
(ii) like that merchandise in component material or materials and in the purposes for which used, and
(iii) approximately equal in commercial value to that merchandise.

* * *

tiffs argue that this conclusion is not supported by substantial evidence and is contrary to law because the EMD sold in Greece is (1) not "like [the exported product] in component material or materials and in the purposes for which used"; and (2) not "approximately equal in commercial value to [the exported product]," as required under 19 U.S.C. § 1677(16)(B)(ii) and (iii).

A. *Component Materials*

In the *Final Results*, Commerce determined that the EMD sold in Greece is "like [the exported product] in component material or materials" pursuant to 19 U.S.C. § 1677(16)(B)(ii) based on several findings.[4] Commerce found that "the most important component materials (*i.e.*, manganese ore, heavy oil, sulfuric acid, etc.) of the U.S. and home market products are the same." *Final Results*, 64 Fed. Reg. at 62,170. Commerce recognized that the home market product is manufactured using a different subtype of a particular input than that used to manufacture the subject merchandise, but found that "the difference [between subtypes of the input] is not a difference in component materials but rather a difference in the equipment used in the manufacturing processes." *Id.* Commerce also dismissed the fact that Tosoh itself had classified the subtype of input used in manufacturing the home market product as a "raw material," as "this designation was solely for accounting purposes because the useful life of the equipment is less than one year." *Id.*

Plaintiffs argue that Commerce's determination is not supported by substantial evidence for two reasons. First, Plaintiffs argue that contrary to Commerce's findings, the input at issue is also an "important" material because it is necessary for the manufacture of the home market EMD and constitutes a substantial percentage of total component material value. Second, Plaintiffs maintain that unlike the subject merchandise, the home market EMD is manufactured using an input subtype that, because it is consumed in the production process, is expensed as a variable cost and is therefore more properly characterized as a component raw material.

Plaintiffs do not establish that Commerce's determinations are not supported by substantial evidence. Substantial evidence "must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). Under 19 U.S.C. § 1677(16)(B), Commerce is not required to find that the products are identical as under 19 U.S.C. § 1677(16)(A).[5] Here, the record shows that (1) except for the input at issue, the materials used in producing the two grades of EMD are identical; (2) both EMD grades have the same physical structure; and (3) meet the same minimum chemical property specifications. *Viability & Comparability Mem.* (Apr.

[4] Commerce and Tosoh concede that the products are not identical pursuant to § 1677(16)(A).

[5] Even under 19 U.S.C. § 1677(16)(A), exact identity is not required. *See Pesquera Mares Australes Ltda. v. United States*, No. 98-08-02680, 2000 WL 766520, at *3–4 (Ct. Int'l Trade June 5, 2000).

29, 1999), at 3, C.R. Doc. 33, Def.'s App., Tab 1, at 7; *Questionnaire Response* (July 7, 1998), at A-17 to A-18, C.R. Doc. 1, Pl.'s App., Tab 4A, at 1–2. Plaintiffs do not dispute any of these facts. Plaintiffs concede that the input subtype that is used in manufacturing the subject merchandise also can be used to produce the home market EMD. Rather than deeming the input unnecessary or unimportant, Commerce reasonably determined that the difference in subtypes alone was not sufficient to outweigh the factual findings in favor of "foreign like product." *See Sony Corp. v. United States*, 13 CIT 353, 357–59, 712 F. Supp. 978, 981–83 (1989) (upholding International Trade Commission's determination that similarities in physical characteristics and production processes outweigh differences asserted by plaintiff). Therefore, even if the subtype of input at issue that was used in manufacturing the home market EMD were properly considered a "component," Commerce's determination of "like in component materials" is supported by substantial evidence.

Plaintiffs' second argument – that the designation of an item for accounting purposes should determine characterization under § 1677(16)(B)(ii) – also lacks merit. Characterization of an item for accounting purposes does not dictate how the item should be classified for the purposes of finding "like in component materials" under 19 U.S.C. § 1677(16)(B)(ii). Rather, the physical characteristics underlying the accounting designation are relevant to, but not dispositive of, Commerce's determination in this regard. For example, in *Silicomanganese from the People's Republic of China*, 65 Fed. Reg. 31,514 (Dep't Comm. 2000) (final admin. rev.), Commerce recognized that an item was not physically incorporated within the final product and, thus, would not normally be considered a direct material input (typically classified as "process materials" that are often included in factory overhead as "consumables"). *See Issues & Decision Mem.*, at Part IV, cmt. 1. Nevertheless, Commerce concluded there that for the purposes of determining "foreign like product," the item was more properly characterized as a cost element separate from factory overhead, and therefore a component part, because it represented a "significant portion of the cost of the finished product." *Id.* Similarly, in *Saccharin from the People's Republic of China*, 59 Fed. Reg. 58,818, 58,823–24 (Dep't Comm. 1994) (final determ.), though respondent characterized a particular item as "factory overhead," Commerce deemed it a direct material input, and therefore a component for the purposes of determining "foreign like product," because it was specially processed, packaged, and shipped to customers and because it was required for a particular segment of the production process for which a substitute was not available.

Commerce in this case properly looked at the physical properties underlying Tosoh's accounting designation and determined that such designation was not determinative. *See Viability & Comparability Mem.*, at 6, Def.'s App., Tab 1, at 6. As Tosoh explained to the Department, the [ ] is part of the finished product only insofar as "it

cannot be totally eliminated in the washing process." *See March 10, 1999 Submission*, at 4, C.R. Doc. 29, Def.'s App., Tab 3, at 1. Based on these findings, Commerce concluded that the input at issue was not a component for the purpose of determining "foreign like product."

B. *Purpose for which Used*

Commerce concluded that the home market EMD and the subject merchandise did not differ in the purpose for which they are used. This conclusion was based on a finding that "Tosoh's customers use both types of EMD grades as a cathode material, which provides the electric charge needed for a battery to perform." *Final Results*, 64 Fed. Reg. at 62,171. Plaintiffs first argue that the batteries that contain the home market EMD cannot be used for the same purposes as the batteries that contain the subject merchandise. Plaintiffs further argue that the EMD sold in the home market was used *primarily* as an *additive* or an "enriching agent" to natural manganese dioxide (NMD) in inexpensive battery cells, while the subject merchandise is solely used in premium, high-drain AA batteries as the cathode material itself. To support their argument, Plaintiffs cite evidence that the EMD Tosoh sold in the home market is of a lower quality and sells for a lower price than the EMD exported by Tosoh to the United States.

First, under 19 U.S.C. § 1677(16)(B)(ii), Commerce need only find that the home market product is "like" the subject merchandise in the purpose for which it is used; it need not find exact identity of purpose, nor must it find like purpose for the device (here, batteries) into which the product is ultimately incorporated. *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1210 (Fed. Cir. 1995) ("[I]t is not necessary to ensure that home market models are technically substitutable, purchased by the same type of customers, or *applied to the same end use* as the U.S. model.") (emphasis added). *See also Sony Corp.*, 13 CIT at 359, 712 F. Supp. at 983 (rejecting plaintiff's contention that lack of interchangeability between products defeats a finding of "similar merchandise"); *Certain Forged Steel Crankshafts from the United Kingdom*, 56 Fed. Reg. 5975, 5977 (Dep't Comm. 1991) (final admin. rev.) ("Under [19 U.S.C. § 1677(16)(B)] end-use is a factor only when the end-use pertains to the product under investigation itself, not to the product into which it is incorporated."), *aff'd*, *United Eng. & Forging v. United States*, 15 CIT 561, 565–67, 779 F. Supp. 1375, 1380–82 (1991). Thus, that the batteries into which the respective grades of EMD were incorporated had different end-uses is not determinative of whether the grades of EMD themselves may properly be considered "like in purposes for which used." Second, that the home market EMD was used by some customers as an additive does not negate the fact that, as Plaintiffs concede, approximately 50% of the EMD sold in the home market was used as the cathode material itself, the same purpose for which the subject merchandise was used. Commerce's finding of "like" purpose is therefore supported by substantial evidence.

C. *Commercial Value*

Commerce concluded that the EMD sold in the home market is "approximately equal in commercial value to [the exported] merchandise" pursuant to 19 U.S.C. § 1677(16)(B)(iii). *Final Results*, 64 Fed. Reg. at 62,171–72. Commerce based its conclusion on two findings: (1) the difference in merchandise ("difmer") fell within 20% of the total manufacturing cost of the subject merchandise, *Electrolytic Manganese Dioxide from Greece*, 64 Fed. Reg. 25,008, 25,009 (Dep't Comm 1999) (prelim. determ.); and (2) the sales data from a third country – the only country selling both grades of EMD at issue during the POR – revealed an extremely low price differential between the two grades.[6] Plaintiffs contend that in this case the difmer test is unusable for the purposes of determining commercial comparability. Plaintiffs also dispute the use of third country sales data.

1. *Application of the Difmer Test*

Ordinarily, the difmer adjustment to normal value is used to account for the difference in cost attributable to the difference in physical characteristics between the home market product and the subject merchandise. *See* 19 U.S.C. § 1677b(a)(6)(C)(ii). *See also Import Administration Policy Bulletin*, No. 92.2 (July 29, 1992) [hereinafter "*Policy Bulletin*"]; *Bethlehem Steel Corp. v. United States*, 2000 WL 726931 at *4 (Ct. Int'l Trade 2000). "[I]f the difmer adjustment . . . exceeds twenty percent, Commerce will not make a finding that the home-market product is reasonably comparable to the exported good, unless it can explain how the comparison is nevertheless reasonable." *Mitsubishi Heavy Industries, Ltd. v. U.S.*,112 F. Supp. 2d 1170, 1171 (Ct. Int'l Trade 2000). In the instant case, Commerce found a difmer within this 20% guideline, as calculated on the basis of variable manufacturing costs.[7] *Final Results*, 62 Fed. Reg. at 62,170. Commerce used the results of this calculation to support its conclusion that the home market product and the subject merchandise were "commercially comparable" for the purposes of determining "foreign like product" under 19 U.S.C. § 1677(16)(B)(iii).

Plaintiffs first argue that the difmer test cannot be applied to support a finding of commercial comparability where the difmer is "distorted" by the difference in physical characteristics between the two grades of EMD. Plaintiffs contend that because the input at issue used in producing the home market product is wholly consumed, it is characterized as a variable cost, and thus factored into the difmer calculation. In contrast, because the disputed input used in producing the subject merchandise is not wholly consumed, it was not included in variable costs and was thus excluded from the difmer calculation. Consequently, Plaintiffs contend that the difmer is therefore neces-

[6] Commerce found that the third-country average unit U.S. dollar price per ton of the [ ] differed from that of the [ ] sales by [ ]. *Commercial Value Mem.* (July 27, 1999), at 2, C.R. Doc. 47, Pl.'s App., Tab 15-A, at 2 ["*Commerical Value Memo*"].

[7] Tosoh reported a difmer of [ ], which is [ ] of the total manufacturing cost of the subject merchandise, [ ]. *Tosoh October 29, 1998 Reply Letter*, at 17, C.R. Doc. 19, Tosoh's App., Tab F-1, at 8.

sarily unbalanced and unusable as support for a determination of commercial comparability. Plaintiffs also allege that Commerce was inconsistent in including as "variable costs" those costs associated with the home market input in calculating the difmer where this item had been excluded from consideration in the determination of "like in component materials" under 19 U.S.C. § 1677(16)(B)(ii).

Commerce responds that it is within its discretion to use the difmer test to support its determination of commercial compatibility and the physical differences between the products are not such that the difmer test cannot be so used. Commerce also explains that it included variable costs associated with the disputed input in the home market EMD because the difmer accounts for not just component materials but also variable factory overhead. *Final Results*, 64 Fed. Reg. at 62,170. Although the court finds Commerce's calculation methodology for the difmer somewhat questionable, *see* note 10 *infra*, Commerce's determination of commercial comparability is supported by substantial evidence.[8]

Commerce has been granted broad discretion to devise a methodology for determining what constitutes "similar" merchandise. *See Koyo Seiko*, 66 F.3d at 1209. Specifically, it is within Commerce's discretion to apply the 20% difmer test in informing its determination of commercial comparability under 19 U.S.C. § 1677(16)(B)(iii). *See SKF USA Inc. v. United States*, 874 F. Supp. 1395, 1399–1400 (Ct. Int'l Trade 1995) (finding that Commerce acted within its discretion in using the 20% difmer adjustment cap as test for identifying similar merchandise).

Commerce is also correct that the difmer allowance normally relies on only variable and semi-variable manufacturing expenses in quantifying cost differences.[9] Furthermore, Commerce did not reject Tosoh's accounting designation of costs associated with the home mar-

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[8] Tosoh Greece cites *Disposable Pocket Lighters from Thailand*, 60 Fed. Reg. 14,263 (Dep't Comm. 1995) (final determ.) ("*Disposable Lighters*") and *United Engineering*, 15 CIT 561, 779 F. Supp. 1375, for the proposition that in determining "foreign like product" under 19 U.S.C. § 1677(16)(B), Commerce may focus on the physical characteristics to the exclusion of commercial value. Notwithstanding the broad language of *United Engineering*, we note that this argument lacks merit. For merchandise to qualify as "foreign like product" under 19 U.S.C § 1677(16)(B), Commerce must consider *all three criteria* set forth therein. *See Timken Co. v. United States*, 11 CIT 786, 792, 673 F. Supp. 495, 503 (1987) (remanding for a determination of whether merchandise compared was of "approximately equal commercial value"). *Accord Nihon Cement Co. v. United States*, 17 CIT 400, 411–12 (1993).

Furthermore, Tosoh's reliance on *Disposable Lighters* and *United Engineering* is misplaced. In *Disposable Lighters*, the Department noted that

> the Department places little weight on the commercial value criterion in determining what constitutes such or similar merchandise. . . . [T]he Department focuses on the similarity of the physical characteristics. . . . The Department's position in this regard has been upheld by the CIT in *United Engineering*.

60 Fed. Reg. at 14,266.

The court in *United Engineering* held that the ITA was not required to consider nonphysical criteria (such as end-use and commercial value) in making its selection of a foreign-market comparison model, but it has the discretion to do so. 15 CIT at 566, 779 F. Supp at 1381. The ITA's selection in that case, however, was under 19 U.S.C. § 1677(16)(C), not § 1677(16)(B) as in this case or in *Disposable Lighters*, for that matter. *See Crankshafts from the United Kingdom*, 56 Fed. Reg. at 5977–78 ("although the statute makes reference to commercial value in section 771(16)(B), we disagree with [the] argument that this requires the Department to consider differences in prices in making such or similar comparisons. . . . [U]nder section 771(16)(C), the Department has the discretion to make reasonable comparisons without regard to commercial value.").

[9] According to the *Policy Bulletin*:

> [i]f the commercial value of the two products is greatly different, then a comparison is not reasonable; the difmer adjustment, being limited to variable manufacturing costs probably cannot fully compensate. . . . When the variable cost difference exceeds 20%, we consider that the probable differences in values of the items to be compared is so large that they cannot reasonably be compared.

The difmer is normally calculated by dividing the difference in variable production costs by the total manufacturing costs of the product exported to the United States. *Id.*

ket input; Commerce merely determined that for the purpose of determining similarity in component materials, such designation was not controlling. In any event, nothing in the language of § 1677(16)(B) compels Commerce to adhere to the characterization under its § 1677(16)(B)(ii) analysis when determining commercial comparability under § 1677(16)(B)(iii), or vice versa. Therefore, use of the difmer test in determining commercial comparability was proper.[10]

2. *The Use of Third Country Sales*

To determine comparability of commercial value, Commerce also relied on data concerning the quantity and value of two EMD grade types sold in one third-country market, [ ]. Commerce relied on sales data from this third country because it was the only market in which Tosoh sold both grades during the POR.[11] Final Results, 64 Fed. Reg. at 62,171–72. Based on this data, Commerce found that the two grades were priced closely enough to support a finding of commercial comparability.

Plaintiffs contend that Commerce erred in relying on data concerning third-country sales where such sales were not representative of the commercial value of the home market type EMD. Plaintiffs argue that the third-country sales cannot represent the commercial value of the home market type EMD because the use of the EMD by the third-country customers differed substantially from the uses of the EMD in the U.S. and home markets. Plaintiffs concede that the EMD sold in the third-country market was used as the cathode material in battery manufacture, but maintain that it was not sold for use as the cathode in *dry-cell* batteries, nor as an additive for an NMD cathode, as in the U.S. and home market products, respectively. Plaintiffs contend that these different uses "may affect relevant supply/demand factors and thus its market value." Plaintiffs therefore urge that the commercial value be determined by comparing the average unit values based on *worldwide* sales of the two grades of EMD, in which case the difference in commercial value would preclude the home market EMD from being a "foreign like product."[12]

[10] This is not to say that Commerce was compelled to apply the difmer test as it did or to calculate the difmer as it did. Here, the calculation includes the costs of the home market input while excluding the costs of its counterpart in the subject merchandise simply because the Policy Bulletin directs that variable and semi-variable costs factor into the difmer analysis. Commerce's findings with respect to the home market input (for the purpose of determining whether the products were "like in component materials") would have warranted exclusion of costs associated therewith when calculating the difmer, notwithstanding Tosoh's designation of such costs as variable. Commerce is ill-advised to consider each criteria under 19 U.S.C § 1677(16)(B) in isolation. All parties seem to accept that the difmer calculation actually showed a few percentage points difference in the wrong direction. The difmer calculation would have been more reliable had Commerce either excluded or included the costs associated with both sub-types of corresponding inputs. Plaintiffs, however, have not requested remand for recalculation of the difmer and do not argue that the difmer would exceed 20% under either methodology suggested by the court. Their argument is that difmer should not be calculated or used, an argument the court rejects.

[11] Commerce had requested the quantity and value of sales to each of the three largest third-country markets where it sold both types of EMD grades during the review period. Tosoh reported that during the period of review it had only one third-country market where it sold both grades of EMD. *Commercial Value Memo*, at 1–2, Pl.'s App., Tab 15-A, at 1–2; *Third-Country Market Submission* (May 5, 1999), at 1–2, C.R. Doc. 35, Pl.'s App, Tab 3 at 1–2.

[12] Plaintiffs contend that commercial value of the type of EMD sold in the home market differs from that of the type sold in the United States by [ ], relying on Tosoh's *Submission of Quantity and Value Reconciliation Letter* (Dec. 9, 1998), at Exh. 1, C.R. Doc. 21, Pl.'s App., Tab 1, at 13. This percentage is apparently based on a comparison of average unit value of each grade of EMD: [ ] per MT for the U.S. market EMD compared to [ ] for the home market EMD. Plaintiffs fail to show, however, how they arrived at these underlying figures. Furthermore, it appears that Plaintiffs calculated average unit value for the year 1997 rather than the POR.

Plaintiffs' assertion that the EMD sold in the third country was not used for the same purposes as the U.S. and home market EMD is not supported in the record. In the *Commercial Value Memorandum*, Commerce cited an affidavit from Tosoh's Director of Sales who stated that "during the review period, Tosoh's [third-country] customer purchased . . . EMD from Tosoh for use as a cathode mixture in the manufacture of primary (*i.e.*, non-rechargeable) dry-cell batteries." Pl.'s App., Tab 15-A, at 4. Furthermore, as stated above, the EMD sold in the home market was not sold exclusively as an enriching agent, but also as the cathode itself. Therefore, the court rejects Plaintiff's invitation to engage in speculation as to what effect any difference in use might have had on the demand and supply of the products sold in the third country. Commerce's use of third-country sales data was appropriate and its calculations derived therefrom appear accurate.[13] Therefore, even though the exact difmer calculation is questionable, Commerce's determination of commercial comparability is supported by substantial evidence. In sum, Commerce's determination under the three-part test of § 1677(16)(B) for determining like product is supported by substantial evidence.

II. *Home Market Viability*

In the *Final Results*, Commerce concluded that pursuant to 19 U.S.C. § 1677b(a)(1) the sales of EMD in the home market constituted a viable basis for calculating normal value. 64 Fed. Reg. at 62,172–73. Commerce's conclusion was supported by three findings. First, Commerce found that the aggregate quantity of foreign like product sold in the home market was greater than five percent of the aggregate quantity of sales of the subject merchandise to the United States.[14] *Id.* at 62,173. Second, Commerce found that there was no "unusual situation" that would warrant a departure from the five percent viability test. *Id.* Third, Commerce found that there was no "particular market situation" within the meaning of 19 U.S.C. § 1677b(a)(1)(C)(iii) that would prevent a proper price comparison.[15] *Id.* Plaintiffs contest only the second and third findings.

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[13] The average unit U.S. dollar prices were [ ] per metric ton for the [ ] grade EMD sales and [ ] per metric ton for the [ ] grade EMD sales, which represents a difference of about [ ]. *Commercial Value Mem.*, at 2, Pl.'s App., Tab 15-A, at 2.

[14] Under 19 U.S.C. § 1677b(a)(1)(C)(ii), third country sales (rather than sales in the exporting country) would be appropriate to determine normal value if "the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States . . . ."

The subparagraph further specifies that "the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States." *Id.* Here, Commerce found that sales in the home market constituted approximately [ ] greater than the aggregate volume of sales of the subject merchandise in the United States. *Viability & Comparability Mem.*, at 7–8, Def.'s Ex. 1, at 7–8.

[15] Under 19 U.S.C. § 1677b(a)(1)(C)(iii), sales in the home market may be rejected as the basis for calculating normal value if "the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price."

A. *Unusual Situation*

To determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating normal value (NV), Commerce compares the respondent's volume of home-market sales of the foreign like product to the volume of U.S. sales of the subject merchandise in accordance with 19 U.S.C. § 1677b(a)(1)(C)(ii). Under normal circumstances, if the respondent's aggregate volume of home-market sales of the foreign like product is greater than five percent of its aggregate volume of U.S. sales for the subject merchandise, the home market is deemed viable and NV may be based on home-market sales. 19 U.S.C. § 1677b(a)(1)(C). The Statement of Administrative Action ("SAA") recognizes, however, that "in unusual situations . . . home market sales constituting more than five-percent of sales to the United States could be considered not viable." H.R. Rep. No. 103-826, at 821, *reprinted in* 1994 U.S.C.C.A.N. 4040, at 4162. When a home market is deemed not viable, Commerce normally calculates NV based on sales to a viable third-country market rather than on constructed value (CV).[16] *See Certain Forged Stainless Steel Flanges from India*, 61 Fed. Reg. 14,073, 14,074 (prelim. results) (Dep't Comm. 1996).

Plaintiffs argue that there is an "unusual situation" warranting rejection of home market sales as a basis for calculating NV because the sales in the United States were "negligible," such that "virtually any volume of home market sales" would satisfy the five percent viability test. Pl.'s Br. at 38–39. Plaintiffs urge that NV be based instead on EMD sales to Switzerland because sales to that country were of sufficient volume "to subsidize Tosoh Greece's penetration of the United States market." *Id.*

Plaintiffs' argument is without merit. Under the pre-Uruguay Round Agreements Act statute, viability was determined by comparing the quantity of goods sold in the home market to those sold in countries other than the United States. Under the current statute, the five percent viability test is determined by comparing home market sales directly to U.S. sales. The SAA clarifies that the use of third country sales data comparator was eliminated from the five percent home market viability test to "prevent the use of 'thin' home markets as the basis for identifying dumping." H.R. Rep. No. 103–826, at 821, *reprinted in* 1994 U.S.C.C.A.N. 4040, at 4162. The term "thin" markets refers to situations whereby the volume of home market sales is high in relation to third country sales such that the 5% test would be satisfied even though the quantity of home market sales might be

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[16] Once Commerce determines that the home market is not viable under one of the conditions in 19 U.S.C. § 1677b(a)(1)(C), Commerce may use third country sales as a basis for calculating NV, provided, however, that they themselves are deemed viable according to the following criteria in § 1677b(a)(1)(B):

> (I) [the price of the foreign like product sold in such country] is representative,
> (II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and
> (III) the administering authority does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price.

extremely low in relation to U.S. sales such that a price-to-price comparison would be unreasonable. Thus, the amendment eliminated the use of the third country sales data comparator to account for the possibility of "false positive" results in the application of the five percent viability test that might arise therefrom. To use Switzerland sales data because the home market sales are somehow "thin" in comparison to U.S. sales, as plaintiffs urge, would turn the SAA on its head. Furthermore, the statute sets no minimum quantity of U.S. sales that may be used in making the direct comparison to home market sales. Indeed, even a single entry of subject merchandise is sufficient where such an entry is indicative of the respondent's regular pricing practices. *See Silicon Metal from Brazil*, 59 Fed. Reg. 42,806, 42,813 (Dep't Comm. 1994) (final admin. rev.) (review based on finding that single sale "constitutes the most accurate reflection of [respondent's] pricing practices during the review period"). *See also Fresh and Chilled Atlantic Salmon from Norway*, 62 Fed. Reg. 1430, 1432 (Dept. Comm. 1997) (final results) (review based on single sale so long as sale based on bona fide arm's length transaction). Plaintiffs have made no showing that the U.S. sales are somehow anomalous in terms of pricing, nor any other circumstances of sale that would render U.S. sales an invalid basis for comparison. Therefore, Plaintiffs have not shown on this basis that Commerce's direct comparison of U.S. sales to home market sales is not supported by substantial evidence or otherwise not in accordance with law.

B. *Particular Market Situation*

Even if the five percent home market viability test may be met under 19 U.S.C. § 1677b(a)(1)(C)(ii), the use of third country sales as a basis for calculating NV may be justified where Commerce, acting in its discretion, finds a "particular market situation" in the exporting country that would preclude a proper comparison with the export price pursuant to §1677b(a)(1)(C)(iii).[17] Although the statute does not specify what constitutes such a "particular market situation," examples given in the SAA include the following: (1) a single sale in the home market constitutes five percent of sales to the United States; (2) government controls over prices "to such extent that home market prices cannot be considered competitively set," and (3) differing patterns of demand experienced in the United States and in the exporting country. Plaintiffs do not contend that any of these scenarios apply to the instant case.[18] Rather, Plaintiffs argue a "particular market situation" exists where (1) the physical characteristics of the home and U.S. market products are so dissimilar that a proper difmer adjustment cannot be made, and, alternatively, (2) home market sales are "inci-

[17] Commerce is not obligated to make findings regarding a "particular market situation," as such a requirement would significantly impair the Department's ability to comply with its statutory deadlines. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,357 (Dep't Comm. 1997) (preamble to final rule).

[18] Tosoh had multiple home market sales during the POR. *See Questionnaire Response*, at Exh. B-1, C.R. Doc. 1, Tosoh's App., Tab B-1 at 17.

dental" to Tosoh and therefore are insufficient to permit a proper comparison with sales to the United States.[19]

Plaintiffs' first argument lacks merit. Where Commerce finds that a proper difmer adjustment cannot be made, it may choose not to use home market sales as a basis for calculating NV. For example, in *Large Newspaper Printing Presses and Components thereof, whether Assembled or Unassembled, from Japan*, 61 Fed. Reg. 38,139, 38,146–47 (Dept. Comm. 1996) (final determ.), Commerce found that use of home market sales as a basis for calculating NV was inappropriate and instead opted to use constructed value (CV) where "the degree of unique customization for customers made the difference-in-merchandise adjustment for product price matching potentially . . . complex." Thus, Commerce's finding in *Large Newspaper Printing Presses* was based on the impracticability of comparing prices set according to the specifications of individual customers. In contrast, EMD is a commodity, the grades of which are established according to industry specifications and the prices of which are not determined according to customer specifications or requested modifications. Because there is nothing in the record to suggest that the sales of the home market EMD did not reflect prevailing market prices for the commodity, Plaintiffs' argument that home market sales are not viable pursuant to 19 U.S.C. § 1677b(a)(1)(C)(iii) must fail.

Plaintiffs' second argument also lacks merit. Plaintiffs contend that the home market sales are "incidental" because they were for a "low value use" and therefore "hav[e] no material effect on a company's profitability." Pl.'s Br. at 44. The term "incidental" for the purposes of determining whether a "particular market situation" exists, however, refers not to the value of the sales or the quality of the goods sold, but to whether the sales were made under normal market circumstances. For example, in *Fresh Atlantic Salmon from Chile*, 63 Fed. Reg. 31,411, 31,418 (Dep't Comm. 1998) (final determ.), Commerce found home market sales to be incidental where the respondent sold substandard (*i.e.*, "reject" or "industrial") grade sales on an "as available" basis and without standard quality guarantees to offset losses that would have been sustained by disposal of the off-market merchandise. The sales in *Salmon from Chile*, therefore, can hardly be said to have been made under conditions that would reflect normal market prices.

Here, in contrast, the home market EMD was sold for use in batteries that were of a lower quality than those into which the subject merchandise was incorporated. It does not follow, however, that the home market EMD sales did not reflect prevailing market prices. In fact, the record reveals evidence that the home market EMD was sold under normal market circumstances: the home market EMD was sold to a regular customer at prices set in arm's-length transac-

[19] Plaintiffs further argue that proper price-to-price comparison is impossible because the home market use of EMD was "unusual" and likely to have adverse effects on the price. Because the court has rejected this argument above, *see supra* at sections I.B & I.C.2., Plaintiffs' argument that these circumstances present a "particular market situation" also must fail.

tions and under a standard guarantee. *Questionnaire Response* at Exhs. A-3, B-1, Tosoh's App., Tab B-1, at 7, 9, 17; *Quantity and Value Reconciliation Letter*, at Exh. 4, Tosoh's App., Tab C. In addition, the home market EMD met basic minimum technical standards. *Questionnaire Response*, at A-21, Exhs. A-3, A-19, A-20, Pl.'s App., Tab 4A, at 5, & Tosoh's App., Tab B-1, at 7, 9, 12–16. Therefore, plaintiffs' contention that the home market sales were incidental and thus not indicative of market prices fails.

III. *Inventory Carrying Costs*

Plaintiffs contend that Commerce erred in including Tosoh's inventory carrying costs in calculating normal value as a constructed export price offset adjustment while disregarding them in calculating CEP.[20] *See* Pl.'s Br., at 47; *Final Results*, 64 Fed. Reg. at 62,174. Specifically, Plaintiffs claim that although the inventory carrying costs were incurred outside the United States, they were incurred in connection with sales to an unaffiliated purchaser in the United States. Because such sales were for the benefit of the unaffiliated purchaser, Plaintiffs argue, they are therefore "associated with" commercial activity in the United States and deductible from CEP under 19 C.F.R. 351.402(b).[21] Pl.'s Br. at 47–48. Plaintiffs concede, however, that disposition of this issue in their favor would have a *de minimis* effect on the dumping margin.[22] Therefore, the court need not resolve whether Commerce erred in the assumptions underlying its calculations as the issue is moot given the court's other holdings.

CONCLUSION

Because the court finds that Commerce's determinations with respect to foreign like product and home market viability are supported by substantial evidence and are in accordance with law, the *Final Results* determination is AFFIRMED.

[20] "Constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of § 1677a. 19 U.S.C. § 1677a(b).

[21] The SAA provides that CEP is calculated to be "as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers." SAA at 823, *reprinted in* 1994 U.S.C.C.A.N. at 1463.

[22] Commerce found a weighted average margin of 0.00 percent for Tosoh for the POR. *Final Results*, 64 Fed. Reg. at 62,175.

(Slip Op. 01–37)

NEENAH FOUNDRY CO.; ALHAMBRA FOUNDRY INC.; ALLEGHENY FOUNDRY CO.; DEETER FOUNDRY INC.; EAST JORDAN IRON WORKS, INC.; LEBARON FOUNDRY INC.; MUNICIPAL CASTINGS, INC.; AND U.S. FOUNDRY & MANUFACTURING CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 99–07–00441

[Plaintiffs' motion for judgment on the agency record granted in part; remanded to the International Trade Administration.]

(Decided April 2, 2001)

Collier Shannon Scott, PLLC (*Paul C. Rosenthal, Robin H. Gilbert* and *Mary T. Staley*) for the plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Director, and *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Robert E. Nielsen*), of counsel, for the defendant.

OPINION & ORDER

AQUILINO, *Judge*: As pointed out in the Slip Opinion 00–7 (Jan. 20, 2000) filed in this case and reported at 24 CIT , 86 F.Supp.2d 1308, and in the Slip Opinion 00–33, 24 CIT (March 31, 2000), filed in the related case numbered 99-11-00716, the plaintiffs contest not only the *Amended Final Results of Expedited Sunset Review: Iron Metal Castings From India*, 64 Fed.Reg. 37,509 (July 12, 1999), which were published by the International Trade Administration, U.S. Department of Commerce ("ITA"), but also the "sunset review" determination of the International Trade Commission ("ITC") pursuant to 19 U.S.C. §1675(c)(1)(1995) that

> revocation of the countervailing duty order on iron metal castings from India would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Iron Metal Castings From India; Heavy Iron Construction Castings From Brazil; and Iron Construction Castings From Brazil, Canada, and China, 64 Fed.Reg. 58,442 (Oct. 29, 1999). That determination led the ITA to publish its notice of *Revocation of Countervailing Duty Order: Iron Metal Castings From India*, 64 Fed.Reg. 61,602 (Nov. 12, 1999).

I

Plaintiffs' complaint against the ITA focuses on the agency's July 1999 *Amended Final Result*s, *supra*, averring in one count that they are not supported by substantial evidence on the record or otherwise

in accordance with law and in a second count that the ITA's determination of countervailable subsidy rates is "erroneous, being significantly understated." Plaintiffs' motion for judgment upon the agency record, subsequently filed pursuant to CIT Rule 56.2, specifies the following grounds for its complaint, to wit: (a) The Engineering Export Promotion Council of India ("EEPC") was not entitled to comment on the ITA's *Final Results of Expedited Sunset Review: Iron Metal Castings From India*, 64 Fed.Reg. 30,316 (June 7, 1999), because it had waived participation in the underlying administrative proceeding; (b) to the extent the domestic industry [plaintiffs herein] pointed to ministerial errors in that review, the EEPC's attempted reply thereto was untimely; (c) even if the ITA had been at liberty to take the EEPC's views into account, the agency could not have concluded from the record developed that India's International Price Reimbursement Scheme ("IPRS") and Cash Compensatory Support ("CCS") program had been completely discontinued; and (d) the ITA erred in its method of calculating subsidy rates for programs countervailed subsequent to the original investigation.

A

The ITA commenced its review of the countervailing-duty order[1] at issue in accordance with 19 U.S.C. §1675(c) (1995)[2] to determine whether revocation of that order would be likely to lead to continuation or recurrence of a countervailable subsidy. *Notice of Initiation of Five-Year ("Sunset") Reviews*, 63 Fed.Reg. 58,709 (Nov. 2, 1998). The agency received a timely-filed notice of intent to participate, as well as a complete substantive response, on behalf of the Municipal Castings Fair Trade Council and its individual members, the plaintiffs now at bar. The EEPC filed a waiver on behalf of the Indian exporters subject to the order, while their government did not respond to the notice of initiation.

In the absence of any substantive response by a respondent interested party, the ITA proceeded with an expedited review of the order and determined that its revocation would be likely to lead to continuation or recurrence of a countervailable subsidy, at rates ranging from 0.84 to 1.82 percent. *See Final Results*, 64 Fed.Reg. at 30,320. The domestic petitioners commented that those *Final Results* reflected certain ministerial errors. Specifically, according to them, the ITA

> failed to include the subsidy rate for . . . IPRS . . . in its final results . . . . The domestic industry, citing the *Sunset Policy Bul-*

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[1] *Certain Iron Metal Castings From India: Countervailing Duty Order*, 45 Fed.Reg. 68,650 (Oct. 16, 1980).

[2] The statutory provisions requiring such five-year or "sunset" reviews of existing antidumping- and countervailing-duty orders were added to the Tariff Act of 1930 by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (Dec. 8, 1994) ("URAA").
References hereinafter to those provisions will be as codified as of the time of the underlying administrative proceeding now at bar unless otherwise cited.

> *letin*, stated that the Department normally "will not make adjustments to the net countervailable subsidy rate for programs that still exist, but were modified subsequent to the order . . . to eliminate exports to the United States (or subject merchandise) from eligibility." The domestic industry argued that Indian foundries that exported heavy castings . . . to the United States were simply told not to make claims for IPRS benefits on those castings. Further, the domestic industry argued that there has never been any termination of the IPRS program overall, and the program continues today.

64 Fed.Reg. at 37,510. The agency thereupon accepted rebuttal from the EEPC, which

> argued that the domestic industry was incorrect in stating that the IPRS program continues to exist [and] asserted that the Department has information on the record of the 1994 administrative review segment of this proceeding stating that the Indian Ministry of Commerce withdrew the IPRS, effective April 1, 1994. Further, the EEPC state[d] that this withdrawal applied to all exporters and all products.

Id. This caused the petitioners to retort

> that the EEPC ha[d] waived its right to participate in this sunset review . . . and the Department should, therefore, reject the EEPC's . . . submission. Further-more, the domestic industry state[d] that it knows of no finding that the IPRS has been terminated, with respect to all exporters and all products.

Id.

The ITA issued its *Amended Final Results*, conceding that it had committed a ministerial error but explaining that the necessary correction left the net subsidy rate unchanged:

> . . . The Department's decision to consider the IPRS program terminated based upon the fact that the program had been modified to exclude exports of heavy castings to the United States was . . . in error because reliance on modification as a basis for finding a program completely terminated is inconsistent with our *Sunset Policy Bulletin*.
>
> However, based on the domestic industry's ministerial allegation and the EEPC's reply, the Department has reexamined all relevant information pertaining to the termination of the IPRS program. The Department located a submission from the Indian Ministry of Commerce, dated April 4, 1994, which demonstrates that the Government of India has fully and completely eliminated the IPRS program (*see* November 19, 1996 Verification Report . . .,

> placed on the record of this sunset review on July 2, 1999). Specifically, the Indian Ministry of Commerce states that "it has been decided to withdraw the . . . IPRS[] with effect from 01.4.1994, *i.e.* benefits under the scheme would be available for eligible engineering goods exports shipped up to . . . 31.3.1994 only." (*Id.*)
>
> Consistent with our Sunset Policy Bulletin . . ., this evidence of the complete and total withdrawal of the IPRS program is the appropriate basis for the Department's finding that the IPRS program is terminated. The Department's correction of its ministerial error . . . does not change the net subsidy rate reported in the original final determination of this sunset review.

Id. (footnotes omitted). The agency also disagreed that the EEPC's comments should have been disregarded, reporting that its regulations

> provide[] that if a respondent interested party waives participation in the sunset review . . ., the Department will not accept or consider any unsolicited submissions from that party *during the course of the review*. The EEPC's submission, however, was not made during the course of the sunset review. Rather, the EEPC filed a reply to ministerial error comments made by the domestic industry *after* the Department had issued its final determination . . . .

Id. (emphasis in original).

(1)

In enacting URAA, Congress has mandated expedited procedures for five-year, sunset reviews whenever there is no or inadequate response by interested parties to a notice of initiation by the ITA.[3] In an action such as this, contesting an expedited determination under 19 U.S.C. §1675(c)(3), this court shall hold it unlawful if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 19 U.S.C. §1516a(b)(1)(B)(ii). *See* 19 U.S.C. §1516a(a)(1)(D).

The defendant asserts herein that the substantial-evidence standard should apply, but the statute and its legislative history are clear that such standard does not govern an expedited sunset review. Spe-

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[3] *See* 19 U.S.C. §1675(c)(3). If domestic interested parties fail to respond, the agency must revoke a countervailing-duty order within 90 days. *See id.*, §1675(c)(3)(A).

> If interested parties provide inadequate responses to a notice of initiation, the [ITA], within 120 days after the initiation of the review, . . . may issue, without further investigation, a final determination based on the facts available, in accordance with section 1677e of this title.

Id., §1675(c)(3)(B).

In addition to the EEPC's formal waiver of participation, the government of India's failure to respond also operated as a waiver of participation under the agency's regulations. *See* 19 C.F.R. §351.218(d)(2)(iii), (iv) (1998). Upon such waiver in a countervailing-duty sunset review, the ITA will conclude that respondent interested parties provided inadequate response to the notice of initiation under the foregoing section 1675(c)(3)(B) and proceed with an expedited review on the basis of facts available. *See id.*; 19 C.F.R. §351.218(e)(1)(ii)(B),(C) (1998).

cifically, URAA amended 19 U.S.C. §1516a

> to apply the arbitrary and capricious standard of review . . . [to] final determinations by Commerce and the Commission under section 751(c)(3). Determinations under section 751(c)(3) will be based on limited information in the record resulting from no response or inadequate response to the notice of initiation. Therefore, such determinations should not be subject to the substantial evidence standard of review. The substantial evidence standard will apply to final determinations under section 752 which are made on the basis of a fully developed record. This is consistent with the legislative history of the 1979 [Trade Agreements] Act establishing two standards of review for certain antidumping and countervailing duty determinations: arbitrary and capricious for Commission preliminary negative determinations of injury and Commerce determinations not to initiate an investigation . . . ; and substantial evidence for determinations in final investigations and reviews.

H.R. Rep. No. 103–826, pt. 1, at 57 (1994). *See also* S. Rep. No. 103–412, at 47 (1994); Uruguay Round Agreements Act Statement of Administrative Action ("SAA"), *reprinted in* H.R. Doc. No. 103–316, vol. 1, at 880 (1994). The arbitrary-and-capricious standard is

> narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

Motor Vehicle Mfr.'s Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)(citations omitted). *See, e.g., American Lamb Co. v. United States*, 785 F.2d 994, 1004 (Fed.Cir. 1986); *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT , , 74 F.Supp.2d 1353, 1368 (1999) (the court must determine whether there is a "rational basis in fact" for the agency's determination).

In determining whether an agency's approach was in accordance with law, the court follows *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), which

> requires the reviewing court to give effect to the intent of Congress if Congress has directly spoken to the precise question at issue and Congress's intent is clear. . . . If, however, Congress has not spoken directly to the issue at bar, the question for the court is whether the agency's interpretation of that issue "is based on a permissible construction of the statute."

Hoogovens Staal BV v. United States, 24 CIT , 86 F.Supp.2d 1317, 1324 (2000), quoting *Chevron*, 467 U.S. at 843. *See also Enercon GmbH v. Int'l Trade Comm'n*, 151 F.3d 1376, 1381 (Fed.Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999) (an agency's interpretation of a statute must be reasonable in light of its language, policies and legislative history).

(2)

The plaintiffs allege that "Commerce erred because it had no discretion to accept a reply from the EEPC to the domestic industry's ministerial error comments, since the EEPC had waived its participation in the sunset review". Plaintiffs' Rule 56.2 Brief, p. 17. The statute provides in relevant part:

> **(4) Waiver of participation by certain interested parties**
> **(A) In general**
>
> An interested party described in section 1677(9)(A) or (B) of this title may elect not to participate in a review conducted by the [ITA] under this subsection and to participate only in the review conducted by the Commission under this subsection.
>
> **(B) Effect of waiver**
>
> In a review in which an interested party waives its participation pursuant to this paragraph, the [ITA] shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of . . . a countervailable subsidy . . . with respect to that interested party.

19 U.S.C. §1675(c). The ITA's regulations explain:

> . . . If a respondent interested party waives participation in a sunset review . . ., the Secretary will not accept or consider any unsolicited submissions from that party during the course of the review. Waiving participation in a sunset review will not affect a party's opportunity to participate in the sunset review conducted by the International Trade Commission.

19 C.F.R. §351.218(d)(2)(i) (1998).

Be those provisions as they are, with regard to the correction of ministerial errors, the statute provides that the ITA

> shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this subsection, the term "ministerial error" includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copy-

> ing, duplication, or the like, and any other type of unintentional error which the [ITA] considers ministerial.

19 U.S.C. §1675(h). The related procedures established by the agency provide, among other things, that a party to the proceeding may file ministerial-error comments within specified time limits and that any replies thereto must be filed with the Secretary with-in five days after the date on which the comments were filed. 19 C.F.R. §351.224(c),(d) (1998). While replies are "limited to issues raised in such comments", there is no express requirement that they be submitted by or on behalf of a party to the proceeding.

It is the defendant's interpretation of these provisions which the plaintiffs now complain is erroneous. Specifically at issue is the agency phrase "during the course of the review". The plaintiffs argue that the process of correcting ministerial errors is an inherent element of the sunset review and that the ITA failed to follow its regulation by accepting the EEPC's comments after the waiver of participation had been received. The defendant counters that the proceeding before the agency ended with its publication of the *Final Results* and that the EEPC submission was not made "during the course of the review".

Neither the statute nor the regulations directly address the precise issue presented herein. Thus, the question before the court is whether the ITA's interpretation follows from the language, policies, and legislative history of the statute. Sunset review is defined simply as "a review under section 751(c) of the Act." 19 C.F.R. §351.102(b) (1998). That section of the statute refers to completion of an expedited review only in terms of the number of days in which the ITA and the ITC must issue their respective final determinations. *See* 19 U.S.C. §1675(c)(3)(B), (c)(5). That is, the statute does not address "the course of the review". There is no facial indication that the ministerial-error process is included, since it necessarily occurs after publication of final results.

The policy and legislative history of the provisions at issue support the agency's interpretation. As a part of its Uruguay-Round commitments, the United States agreed that a "countervailing duty shall remain in force only as long and to the extent necessary to counteract subsidization which is causing injury." Agreement on Subsidies and Countervailing Measures, April 15, 1994, art. 21.1, *reprinted in* H.R. Doc. No. 103–316, vol. 1, at 1556 (1994). The United States further agreed to provide for the termination of countervailing-duty orders after five years, unless the ITA and the ITC determine that revocation would be likely to lead to continuation or recurrence of subsidization and material injury. *Id.*, art. 21.3. This policy, among others, was implemented by URAA, *supra*. Thus, the underlying purpose of a countervailing-duty sunset review is to eliminate those outstanding orders which are no longer viable.

A concurrent goal of Congress in providing for expedited sunset reviews was "to eliminate needless reviews and promote administra-

tive efficiency." H.R. Rep. No. 103–826, pt. 1, at 56. This aim is effectuated by 19 U.S.C. §1675(c)(3)(B), which, as noted above, provides for expedited review if there is inadequate response to a notice of initiation either by domestic or foreign interested parties. This is particularly important with regard to the latter interests:

> As a practical matter, in five-year reviews conducted by Commerce regarding the likelihood of continuation or recurrence of countervailable subsidies, an adequate response to an initial request for information must include a response from the foreign government in question. The participation of the foreign government is indispensable, because only that government is in a position to explain its actions and intentions with respect to present and future subsidization. Therefore, the Administration intends that if the relevant foreign government does not respond, Commerce will proceed in accordance with section [1675(c)(3)(B)], and will rely on evidence provided by the domestic industry.

H.R. Doc. No. 103–316, vol. 1, at 880. Thus, where a foreign government elects not to participate, Congress has placed added emphasis on administrative efficiency in countervailing-duty sunset reviews, making waiver of participation available in an effort to "reduce the burden on all parties". S.Rep. No. 103–412, at 46; H.R. Rep. No. 103–826, pt. 1, at 57.

While this language at first glance would appear to support plaintiffs' position that the ITA should not have accepted any information from the EEPC in view of the waiver, the statute and its legislative history must be read as a whole. *Cf. Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (while "scattered statements" supported respondents' position, the statute and legislative history as a whole precluded its acceptance). The push for efficiency should not erode other important policies expressed in the statute. In particular, the ministerial-error provisions of section 1675 underscore the need for both accuracy and efficiency, allowing the agency to amend determinations without "expensive litigation that unnecessarily burdens the court system, in order to correct essentially unintended errors." *Federal-Mogul Corp. v. United States*, 16 CIT 975, 981, 809 F.Supp. 105, 111 (1992), quoting H.R. Rep. No. 100–40, pt. 1, at 144 (1987). Indeed, "it is axiomatic that fair and accurate determinations are fundamental to the proper administration of our [trade] laws[, and] courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination." *Koyo Seiko Co. v. United States*, 14 CIT 680, 682, 746 F.Supp. 1108, 1110 (1990), and cases cited therein.

The fact that foreign interested parties have waived participation in a proceeding does not absolve the ITA of its responsibility to reach an accurate result. In fact, accuracy may be even more important if the U.S. government intends to encourage foreign respondents to

consider waiver as a realistic option. Moreover, allowing a party that has waived participation to reply to ministerial-error comments can hardly be expected to derail the intended expedition of a review. The correction of ministerial errors does not require the agency to begin anew, nor should it result in unnecessary delay. *See, e.g., NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed.Cir. 1995). Indeed, court-ordered amendments have been held "not destructive of the ITA's ability to manage its proceedings", *e.g., Brother Indus., Ltd. v. United States*, 15 CIT 332, 341, 771 F.Supp. 374, 384 (1991), and voluntary correction by the agency could eliminate any need for judicial intrusion.[4] Notwithstanding the nature of the contested instant case, ministerial errors are rarely the source of debate, as they are "by their nature not errors in judgment but merely inadvertencies [*sic*]." *NTN Bearing Corp. v. United States*, 74 F.3d at 1208. Therefore, the court finds that the minimal burden on the parties and the agency of accepting ministerial-error replies from interested parties which waived participation in a sunset review is outweighed by the interest in fair and accurate determinations by the ITA. In light of the relevant statutory language, policies, and legislative history, the court concludes that the agency's interpretation is in accordance with law and not arbitrary, capricious, or an abuse of discretion.

B

The plaintiffs also argue that the ITA erred in accepting comments from the EEPC because they were not timely filed, and "the agency *had no discretion whatsoever* to accept untimely replies to ministe-

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[4] The court cannot accept plaintiffs' argument that the attempt to distinguish comments made in connection with ministerial errors from other substantive submissions is "ludicrous" and "nothing more than a way for Commerce to shoehorn information into the record that was not placed on the record in a timely fashion."

In a sunset review, the ITA is to provide the ITC with the net countervailable subsidy that is likely to prevail if an order is revoked. *See* 19 U.S.C. §1675a(b)(3). Even in an expedited review being conducted on the basis of facts available, the ITA necessarily relies on countervailing duty rates "as applicable, from prior Department determinations". 19 C.F.R. §351.308(f)(1) (1998). *See Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin*, 63 Fed.Reg. 18,871, 18,876 (April 16, 1998) (adjustments to the subsidy rate from the investigation are appropriate where changes in the program have occurred that are likely to affect the net countervailable subsidy likely to prevail after revocation).

The ITA duly reviewed its prior determinations in this matter, specifically citing changes in subsidy programs over the history of the order in its *Final Results*. *See* 64 Fed.Reg. at 30,319–20 ("As a result of changes in programs since the imposition of the . . . order, the Department has determined that using the net countervailable subsidy rates, as determined in the original investigation, is no longer appropriate").

To require the agency to correct a ministerial error in the final results of a sunset review without re-examination of the specific issue in the determinations preceding it would indeed be ludicrous, particularly where relevant information may simply have been overlooked given the underlying order's history and the statutory time constraints. It has been held, for example, that

> those documents at the agency which become sufficiently intertwined with the relevant inquiry are part of the record, no matter how or when they arrived at the agency.
>
> * * *
>
> . . . [I]n a case . . . where the agency in its decision states without qualification that it has examined "the original investigations . . .," the court must assume that all relevant information from those previous investigations is before the agency for the purpose of the current decision. . . . As the agency expressly incorporated such information into the proceeding at issue, without such information the decision at issue cannot be reviewed properly.

Floral Trade Council v. United States, 13 CIT 242, 243, 709 F.Supp. 229, 230–31 (1989). *Cf. Sanyo Elec. Co. v. United States*, 23 CIT , , 86 F.Supp.2d 1232, 1240–41 (1999) (data from earlier administrative review properly excluded from later review because ITA did not "expressly incorporate" it in the record); *Mitsuboshi Belting Ltd. v. United States*, 18 CIT 98, 103 (1994) (refusing to add information from a prior administrative review to the record of a subsequent review because the data were not intertwined, and, unlike *Floral Trade Council*, the action did not concern the scope of the order, in which circumstance "the agency is required to re-examine the . . . determination").

rial error comments." Plaintiffs' Rule 56.2 Reply Brief, p. 1 (emphasis in original). This court cannot, and therefore does not, concur.

While, as a general rule, an agency is required to comply with its own regulations, *e.g., Cummins Engine Co. v. United States*, 23 CIT ___, ___, 83 F.Supp.2d 1366, 1378 (1999), the Supreme Court has stated that

> "[i]t is always within the discretion of a[n] . . . administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. . . . [S]uch a case is not reviewable except upon a showing of substantial prejudice to the complaining party."

American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970), quoting *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953). *See Kemira Fibres Oy v. United States*, 61 F.3d 866, 875 (Fed.Cir. 1995). In other words, "not every failure of an agency to observe timing requirements voids subsequent agency action, especially when important public rights are at stake." 61 F.3d at 871, citing *Brock v. Pierce County*, 476 U.S. 253, 260 (1986). These principles apply to procedures specifically mandated by statute, as well as to those crafted by an agency exercising statutory discretion via regulations:

> . . . [I]n the context of an agency's failure to comply with statutorily-mandated timing directives, the Supreme Court has rejected the argument that non-compliance with a timing requirement renders subsequent agency action voidable, instead recognizing that "if a statute does not specify a consequence for noncompliance . . . , the federal courts will not in the ordinary course impose their own coercive sanction."
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> * * *
>
> The argument rejected by the Supreme Court is even less cogent when . . . the relevant statute does not provide a timing requirement, but the requirement is found in the administering agency's implementing regulations. . . . The national interest in the regulation of importation should not fall victim to an oversight by Commerce . . ..

Id. at 872–73 (citation omitted).

Section 1675(h) of Title 19, U.S.C. gives the ITA discretion to establish procedures for the correction of ministerial errors in final determinations "within a reasonable time", and the agency has accordingly done so. *See* 19 C.F.R. §351.224 (1998). With regard to replies to ministerial-error comments, the regulation provides that they "be filed within five days after the date on which the comments were filed with

the Secretary." *Id.*, §351.224(c)(3). Neither the statute nor the regulation provides for the agency's failure to enforce its own deadline for replies. Nowhere is it suggested that such a circumstance void the final results, particularly when the ministerial-error process is nonetheless completed within a "reasonable time" after the determination issues in accordance with the statutory mandate. Moreover, it has been recognized that the ITA "normally has the discretion to accept or reject untimely filed submissions . . .. Commerce routinely accepts and rejects [such] submissions depending on the circumstances of each case." *Böwe-Passat v. United States*, 17 CIT 335, 337 (1993).

In the light of the foregoing principles, the court cannot remand this case because of the timing of the EEPC submission unless the plaintiffs show that they were substantially prejudiced by its acceptance. They first assert such prejudice by explaining that before receiving the EEPC reply

> Commerce was prepared to accept plaintiffs' ministerial error allegation . . . and reverse its determination that the IPRS program had been terminated. . . . But Commerce ultimately reached the opposite result upon considering th[at] . . . submission . . . . If Commerce had not considered the untimely EEPC submission, Commerce would thus have reversed its finding that the program had been completely terminated and would, instead, not have deducted an amount for the IPRS subsidy program from the rates it found. This would have resulted in a significant increase in the net countervailable subsidy rates . . . .

Plaintiffs' Rule 56.2 Reply Brief, pp. 2–3. However, a party is not

> "prejudiced" by a technical defect simply because that party will lose its case if the defect is disregarded. Prejudice, as used in this setting, means injury to an interest that the statute, regulation or rule in question was designed to protect.

Intercargo Ins. Co. v. United States, 83 F.3d 391, 396 (Fed.Cir. 1996) (citations omitted), *cert. denied*, 519 U.S. 1108 (1997). The mere fact that the ITA might have reached a result more favorable to the plaintiffs had it refused to consider the EEPC reply does not amount to substantial prejudice.[5]

The plaintiffs also assert prejudice in that the ITA's disregard of its regulations led it to consider "a critical, complicated, and highly contested legal and factual issue without affording plaintiffs any meaningful opportunity to have their views on this issue considered as well." Plaintiffs' Rule 56.2 Reply Brief, p. 4. They focus not on the

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[5] The agency was not precluded from attempting to correct its admitted error based on the domestic industry's comments alone. Having conceded that it relied on inadequate evidence of termination in the *Final Results*, the ITA could have sought to correct it by reviewing information pertaining to that issue already in the record of the proceeding. *See supra* note 4. Assuming the agency located the same documentation presented by the EEPC, its determination might have been identical to that now at bar.

approach to ministerial errors but on the absence in an expedited review of a preliminary determination, case and rebuttal briefs, and a hearing. They further assert that by accepting an untimely reply, the agency "allowed the EEPC effectively to retract its waiver without giving the domestic industry the corresponding procedural rights and benefits it would have had if the EEPC had participated in the sunset review from the outset". *Id.* at 6.

The court cannot concur in this argument. The plaintiffs themselves raised the issue of ministerial error, but are now dissatisfied that the ITA's reaction did not achieve the desired result. Indeed, the agency afforded them a greater opportunity to respond to the EEPC reply than is provided for by the regulations, which refer only to "comments". *See* 19 C.F.R. §351.224(c) (1998). It accepted rebuttal from the plaintiffs, which contended that the EEPC reply should not have been accepted and that the agency had made no finding that IPRS was terminated "across the board to all exporters and all products" as the EEPC claimed. Plaintiffs' Appendix, tab 8. After the *Amended Final Results* came forth, the plaintiffs again filed comments, which the agency accepted, stressing the same point. *See id.*, tab 9.

It has been held under similar circumstances that acceptance of untimely submissions by the ITA results in no substantial prejudice based merely on the enforcement of the same regulatory time limits in other cases, particularly when the party opposing the untimely information has also been allowed to respond. *E.g., Taiyuan Heavy Mach. Import & Export Corp. v. United States*, 23 CIT , , Slip Op. 99–103, pp. 8–9 (Oct. 6, 1999). That is, where the party opposing the timing of the submission of information is not held to a different standard, no prejudice occurs. The plaintiffs in this case were not held to a different standard, having alleged a ministerial error and having been given wider latitude than the regulations actually provide.

Furthermore, there is no denial of due process where, as here, the complainants are unable to demonstrate specifically how their participation was impaired by the agency's action. *See, e.g., id.* at 9. The "prejudice" to which the plaintiffs now attempt to point was not a result of the ITA's acceptance of untimely comments, rather a necessary consequence of the expedited review process. The prerogative to waive participation rests with respondent interested parties in a sunset review, and petitioners can neither force them to participate in a full review nor preclude their pointing to ministerial errors after the review ends. The expedited process in itself does not deny domestic interested parties their due; it simply means that any substantive issues arising out of the final results, as well as any further disputes over correction of ministerial errors, must and can be resolved via judicial review. Thus, plaintiffs' alleged inability to have their views more fully considered before the agency was merely the result of the expedition in accordance with the ITA's regulations rather than any actionable shortcoming on the part of the agency. In sum, even if the EEPC reply had been received earlier, the outcome would presum-

ably have been the same, and the plaintiffs were not substantially prejudiced by its timing.

C

The plaintiffs argue in the alternative that, even if the ITA properly considered the EEPC reply, the agency's conclusion that IPRS was terminated lacks a rational basis in fact. In essence, they contend that the ITA's failure to consider the method of termination and likelihood of reinstatement contravened its own published policies for sunset reviews and ignored record evidence that the program was never "completely and fully" terminated.

(1)

As noted above, an agency is generally required to comply with its own regulations. *E.g., Kemira Fibres Oy v. United States*, 61 F.3d at 871, citing *Dodson v. U.S. Dep't of the Army*, 988 F.2d 1199, 1204 (Fed.Cir. 1993). In reviewing an ITA determination, the court

> must evaluate [its] validity . . . on the basis of the reasoning presented in the decision itself. An agency determination "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order . . .." Nor may "post hoc rationalizations" of counsel supplement or supplant the rationale or reasoning of the agency.

Hoogovens Staal BV v. United States, 24 CIT at , 86 F.Supp.2d at 1331 (citations omitted). While the court will uphold a decision of less-than-ideal clarity if the agency's path may be reasonably discerned, *e.g., Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945), it may not conjure a reasoned basis for the agency's action that Commerce itself has not given. *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947). *See also Hoogovens Staal BV v. United States*, 22 CIT , , 4 F.Supp.2d 1213, 1219 (1998).

Under URAA, congressional intent clearly is that, if a

> foreign government has eliminated a subsidy program, . . . Commerce will consider the legal method by which the government eliminated the program and whether the government is likely to reinstate the program. For example, programs eliminated through administrative action may be more likely to be reinstated than those eliminated through legislative action.

H.R. Doc. No. 103–316, vol. 1, at 888. Recognizing this direction, the ITA's published policies also require consideration of the method of revocation and likelihood of reinstatement when a subsidy is terminated. *See Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin*, 63 Fed.Reg. 18,871, 18,875, §III.A.5 (April 16, 1998). The agency

"normally will determine that programs eliminated through administrative action are more likely to be rein-stated than those eliminated through legislative action." *Id.* Furthermore, in calculating the net countervailable subsidy likely to prevail if an agency order is revoked, the ITA will "normally" adjust the rate determined in the original investigation "[w]here [it] has conducted an administrative review of the order . . . and found that a program was terminated with no residual benefits and no likelihood of reinstatement". *Id.* at 18,876, §III.B.3(a).

(2)

The document submitted by the EEPC and later located by the ITA in the record of its 1994 administrative review is a letter from the Indian Ministry of Commerce to the EEPC stating that "it has been decided to withdraw the . . . IPRS[] with effect from 01.4.1994, *i.e.* benefits under the Scheme would be available for eligible engineering goods exports shipped up to 31.3.1994 only." Defendant's Exhibit 1, p. 72. As indicated in the *Amended Final Results*, the ITA concluded that this document "demonstrates that the Government of India has fully and completely eliminated the IPRS program"[6], apparently adopting the position in the EEPC reply that the withdrawal "applied to all exporters and all products". While the agency did cite the 1996 and 1997 verification reports from administrative reviews as evidence that no residual benefits exist under IPRS, it provides neither analysis of the method of termination nor consideration of the likelihood of reinstatement.

The ITA claims that its conclusion is consistent with its *Sunset Policy Bulletin*, *supra*, citing §III.B.3(a). This court cannot agree. As the plaintiffs point out, "a pronouncement from an Indian government administrative agency[] is precisely the type of government action that Congress cautioned Commerce against using as the basis for a finding of termination." Plaintiff's Rule 56.2 Reply Brief, p. 8. Moreover, while the document presented by the EEPC was a part of the record of the 1994 administrative review, the agency never made a formal finding that IPRS was terminated. Instead, it repeatedly characterized the subsidy program as one "not used"[7]. While the defendant correctly states that legislative action is "*not* a mandatory prerequisite before Commerce may conclude that a program has been eliminated"[8], it is *mandatory* that the ITA give a reasoned explana-

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[6] 64 Fed.Reg. at 37,510.

[7] *See, e.g., Certain Iron-Metal Castings From India; Final Results of Countervailing Duty Administrative Review*, 62 Fed.Reg. 32,297, 32,299 (June 13, 1997); *Certain Iron-Metal Castings From India; Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 63 Fed.Reg. 64,050, 64,051 (Nov. 18, 1998). The ITA had previously stated that the government of India "officially terminated" IPRS with respect to exports of the subject merchandise, but this was apparently the source of the ministerial error in the sunset review, as the agency went on to explain that it had verified that by examining a Ministry of Commerce circular which stated that "IPRS claims are not to be made on exports of the subject merchandise to the United States." *Final Results of Countervailing Duty Administrative Review: Certain Iron-Metal Castings From India*, 56 Fed.Reg. 41,658, 41,662 (Aug. 22, 1991) (1987 period of review).

[8] Defendant's Memorandum, p. 26 (emphasis in original).

tion for a departure from its established norms. *E.g., Torrington Co. v. United States*, 15 CIT 456, 461, 772 F.Supp. 1284, 1288 (1991). Here, the legislative intent and the agency policy are that an adjustment be made to the subsidy rate where a program is terminated with no likelihood of reinstatement and that those terminated by administrative action are more likely to be reinstated than if terminated legislatively. The ITA has not followed that policy here, and this matter must be remanded for consideration of the controlling factors. *See, e.g., Former Employees of Alcatel Telecomm. Cable v. Herman*, 24 CIT ___, ___, Slip Op. 00–88, p. 7 (July 27, 2000) (agency decision not based on a consideration of the relevant factors is arbitrary and capricious).

Counsel for the defendant offer the following explanation for the failure to analyze the necessary factors:

> In situations in which a program was initiated by administrative action and subsequently terminated administratively, Commerce has determined that the program at issue has been eliminated for purposes of its sunset review calculations. For example, in its sunset review of live swine from Canada, Commerce explained:
>
> > . . . The Department agrees that the elimination of a program administratively is not as strong a basis for a finding of termination as elimination through legislative action. . . . However, *where a program was put in place administratively, it is reasonable to expect that the government would terminate the program in the same manner.* In these circumstances, unless there is a basis for concluding that the government is likely to reinstate the program, we continue to believe it is appropriate to treat a program previously found to be terminated in an administrative review as terminated for the purpose of sunset reviews.

Defendant's Memorandum, p. 27 (citations omitted, emphasis in original). While it may be true that the ITA has previously employed such reasoning, this fact alone does not absolve its explaining its rationale in the *Amended Final Results* at bar. Belated presentation by counsel in court, rather than in the agency's published decision, is simply unacceptable post-hoc rationalization. Moreover, the proffered reasoning is inapposite here. As noted above, despite the letter on the record of the 1994 review, IPRS was neither then, nor later, "found to be terminated in an administrative review" by the ITA.

(3)

The plaintiffs also allege that there is no rational basis for the ITA's conclusion that India's CCS program was terminated. Unlike IPRS, however, the ITA has found in the course of an administrative review that that program was completely terminated. *Certain Iron-Metal Castings From India: Final Results of Countervailing Duty Administrative Review*, 60 Fed.Reg. 44,849, 44,851 (Aug. 29, 1995). While the

court cannot be expected, and indeed has no statutory authority in a sunset review, to reopen the merits of every determination in the history of a proceeding[9], it notes that the ITA considered the method of termination and the likelihood of reinstatement in that particular administrative review. Despite the Indian government's official announcement's having referred to both "suspension" and "termination" of CCS, the ITA verified that the program was "altogether terminated by the Ministry of Commerce . . . from 3rd July 1991 and there is no plan to reinstate it." Plaintiffs' Exhibit 12, tenth page (EEPC response to supplemental questionnaire in administrative review for 1990).

Hence, with regard to the CCS program herein, the ITA followed its "normal" practice of adjusting the subsidy likely to prevail upon revocation to reflect the termination of that program with no residual benefits or likelihood of reinstatement. Sunset *Policy Bulletin*, 63 Fed.Reg. at 18,876, §III.B.3(a). The court cannot concur with plaintiffs' position that such an adjustment was arbitrary and capricious.

(4)

The plaintiffs argue that, even if the evidence concerning IPRS and CCS was properly considered, and tended to support the ITA's approach,

> the law mandates verification of any such evidence before Commerce can revoke the subject order. Section 782(i) of the statute states that "[t]he administering authority *shall* verify all information relied upon in making . . . a revocation under section 751(d) . . . ." 19 U.S.C. §1677m(i)(2) (emphasis added). The revocations encompassed by section 751(d) of the statute include revocations in five-year (sunset) reviews. 19 U.S.C. §1675(d)(2). Accordingly, the statute mandates that verification be conducted prior to revoking an order in a sunset review.
>
> Commerce has adopted new regulations addressing this statutory requirement. Section 351.307(b) . . . echoes the mandate of the statute, stating "the Secretary will verify factual information

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[9] The plaintiffs contrast the consequence of a termination finding in an administrative review with that of a sunset review, explaining that the former involves an adjustment to the subsidy and cash deposit rates, which can be readjusted in a subsequent review if the program is reinstated. Plaintiffs' Rule 56.2 Reply Brief, p. 11. However, according to the plaintiffs, in the latter context "there is no way to reinstate the . . . order." *Id.*

Whatever the validity of this assessment, it cannot support plaintiffs' further claim that the legislative history and *Sunset Policy Bulletin* impose "a more rigorous standard" for evaluating termination issues than is required in regular administrative reviews. *See id.*, pp. 13–14. If this were true, section III.B.3(a) of the *Bulletin* would be superfluous because no administrative-review finding would ever be adequate to support the same finding in a sunset analysis.

The termination of the CCS program undermines plaintiffs' position. *See* 60 Fed.Reg. at 44,851. In the 1990 administrative review, for example, the ITA followed its regular practice, as reflected in its regulations and explained in *Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comments*, 54 Fed.Reg. 23,366 (May 31, 1989). Specifically, in establishing the estimated countervailing-duty cash deposit rate, the agency accounted for "program-wide changes", defined in part as those "implemented by an official act, such as the enactment of a . . . decree". *Id.* Moreover, the policy provided that the ITA would not make an adjustment for the termination of a program whenever it determines that "residual benefits continue[] to be bestowed". *Id.* at 23,378.

The agency verified that CCS was terminated, with no plan of reinstatement, "by an official government announcement" and found "no evidence of any application for or receipt of residual benefits under the CCS program." 60 Fed. Reg. at 44,851. Without reopening the merits of that determination, it is obvious that the findings are based on considerations almost identical to those required by the *Sunset Policy Bulletin*.

> upon which the Secretary relies in . . . [a] revocation under section 751(d) of the Act." 19 C.F.R. §351.307(b)(iii). The plain language of the statute and this regulatory provision, therefore, require a verification of any factual information on which the Secretary intends to rely in issuing a revocation.

Plaintiffs' Rule 56.2 Brief, p. 35. The defendant disagrees, explaining that it

> has reasonably interpreted the statutory verification requirements for sunset reviews to apply when Commerce, itself, determines that an order should be revoked based upon a determination that revocation would not be likely to lead to a continuation or recurrence of (in this case) a countervailable subsidy. The pertinent part of the *Sunset Regulations* is clear on this point:
>
> > *Verification.*–(i) In general. The Department will verify factual information relied upon in making its final determination normally only in a full sunset review . . . and only where needed. The *Department will conduct verification normally only if, in its preliminary results, the Department determines that revocation of the order . . . is not likely to lead to a continuation or recurrence of a countervailable subsidy or dumping . . . .*
>
> 19 C.F.R. §351.218(f)(2)(i) (emphasis added). In other words, if Commerce determines during a sunset review that revocation is warranted, it will conduct a verification. In this case, Commerce made no [such] determination . . . . Therefore, no verification was required.

Defendant's Memorandum, p. 33.

At first blush, the statute appears to require verification whenever the ITA revokes an order after a sunset review. However, a closer examination reveals that the language is in fact unclear and that the practical effect of plaintiffs' interpretation is at odds with the intent of URAA. Specifically at issue is the meaning of the phrase "making a revocation". This could either include any revocation carried out by the agency, or only those where the ITA directly contributes by making a negative determination on the likelihood of continuation or recurrence of subsidization. As the defendant points out, plaintiffs' position would require the agency

> to conduct a verification in every sunset review because it has no ability to anticipate those instances in which the Commission will make a negative injury determination so that the particular order must subsequently be revoked. Yet, it is clear from the statutory and regulatory provisions that it was not intended to require Commerce to conduct a verification in every sunset review. In fact, such a requirement would place and [sic] enormous burden

> on Commerce in terms of the time, personnel, and financial resources that would be needed for such an undertaking. In addition, respondents would be subject to similar burdens preparing for and participating in such verifications. This result runs counter to the option Congress expressly made available to respondents permitting them to waive their participation in Commerce's sunset reviews. In enacting this provision, Congress observed that it had "made this option available in an effort to reduce the burden on all parties." Plaintiffs' interpretation, which would lead to automatic verifications in all sunset reviews, would completely thwart this option.

Id. at 33–34 (citations omitted). The court agrees that the impact of plaintiffs' interpretation would run counter to the statutory intent as expressed in the legislative history and discussed in part A, *supra*. The ITA has reasonably interpreted the statutory requirement to mean that verification is not required in an expedited sunset review where it made no determination that subsidization was likely to continue if its underlying order were revoked.

Moreover, even if verification were generally necessary in expedited sunset reviews that resulted in revocation of an order, the particular type of information at issue in this case appears to be excepted from such a requirement by the statutory provisions governing determinations on the basis of facts available and the associated legislative history. As previously discussed, 19 U.S.C. §1675(c)(3)(B) provides that, where interested parties provide inadequate response to a notice of initiation, the ITA may issue a final determination in accordance with 19 U.S.C. §1677e, relying on the "facts otherwise available". Those facts may include secondary information such as that "derived from . . . any previous review under [19 U.S.C. §]1675".[10] The ITA's conclusions regarding the termination of IPRS and CCS were derived from previous administrative reviews under 19 U.S.C. §1675(a). Section 1677e further provides:

> **(c) Corroboration of secondary information**
>
> When the [ITA] . . . relies on secondary information rather than on information obtained in the course of an investigation or review, the [ITA] . . . shall, to the extent practicable, corroborate that information from independent sources that are reasonably

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[10] 19 U.S.C. §1677e(b)(3). The types of secondary information that may be relied upon are enumerated in the statutory provision governing inferences adverse to an interested party which failed to cooperate by not acting to the best of its ability to comply with a request for information from the ITA or the ITC. However, the court sees no reason to assume that secondary information cannot also be used as facts otherwise available where no adverse inference is called for.

Presumably, no adverse inference was drawn in this case because the EEPC waiver was voluntary, which reduced the burden on all parties involved herein. *See* EEPC Waiver of Participation, Plaintiffs' Exhibit 4, pp. 1–2 ("The reason for this waiver is that the [ITA] has just concluded a review of the order . . . and is about to commence another. Accordingly, [it] has considerable amounts of data, and will soon have more, on the current status of the Indian castings exporters").

at their disposal.

The legislative history explains how this provision applies, for example, in a sunset review:

> . . . The Administration does not intend that the corroboration requirement will apply when information from a prior determination is being used to establish the facts concerning the period that was the subject of that prior determination. In such cases, the information is not being used "rather than" facts obtained in the course of the current . . . review. This situation may arise, for example, when a prior determination is used for evaluating the likelihood of future injury if an order is revoked . . . in . . . a five-year review under [19 U.S.C. §1675(c)].

H.R. Doc. No. 103-316, vol. 1, at 870. Using information from a prior review to determine whether revocation is likely to lead to continuation or recurrence of a countervailable subsidy clearly falls within this reasoning.

D

The plaintiffs also allege that the ITA's methodology for calculating the net countervailable subsidy violates the statute and is irrational. Specifically, they assert that the legislation is "complete and clear" and that the agency

> did not follow the *Sunset Policy Bulletin's* instructions nor the SAA or House Report's guidelines. The *Sunset Policy Bulletin* first provides that Commerce will "normally" select the rate from the original investigation, but then identifies seven situations that may justify deviation from the original rate. Although Commerce adjusted the rate from the original investigation based on two of the . . . seven adjustments, the agency inexplicably ignored a third, equally applicable, adjustment that provides that it may select a different rate when the subsidy rate has increased in a subsequent administrative review.

Plaintiffs' Rule 56.2 Reply Brief, p. 18 (citations omitted). Furthermore, they contend that the

> individual program rates, individual company rates, and "all others" rates selected by the agency in this sunset review are *lower* than rates found in more recent administrative reviews. Thus, by relying on the initial, lower rates, Commerce predicted that revocation of the order would result in a *reduction* of countervailable benefits. Stated differently, the sunset results imply that revocation of the order would cause foreign governments to reduce the amount of subsidies provided to exporters. Simply put, this result

> makes no sense. . . .

Id. at 19 (emphasis in original).

The statute requires that the ITA inform the ITC of "the net countervailable subsidy that is likely to prevail if the order is revoked or the suspended investigation is terminated." 19 U.S.C. §1675a(b)(3). Moreover, the ITA "shall normally choose" a rate that was determined either in the original investigation or an administrative review of the particular program. *Id.* The legislative history explains further:

> . . . The Administration intends that Commerce normally will select the rate from the investigation, because that is the only calculated rate that reflects the behavior of exporters and foreign governments without the discipline of an order . . . in place. In certain instances, a more recently calculated rate may be more appropriate. For example, if dumping margins have declined over the life of an order and imports have remained steady or increased, Commerce may conclude that exporters are likely to continue dumping at the lower rates found in a more recent review.

H.R. Doc. No. 103-316, vol. 1, at 890–91. *See also* H.R. Rep. No. 103–826, pt. 1, at 64. The *Sunset Policy Bulletin* elaborates on the circumstances under which the agency may adjust the net countervailable subsidy. Specifically at issue is section III.B.3, which states in relevant part that

> section 752(b)(1)(B) of the Act provides that the [ITA] will consider whether any change in the program which gave rise to the net countervailable subsidy determination . . . has occurred that is likely to affect the net countervailable subsidy. Consequently, although the SAA. . . and the House Report . . . provide that the [agency] normally will select a rate from the investigation, this rate may not be the most appropriate if, for example, the rate was derived . . . from subsidy programs which were found in subsequent reviews to be terminated, there has been a program wide change, or the rate ignores a program found to be countervailable in a subsequent administrative review.
>
> Therefore, the [ITA] may make adjustments to the net countervailable subsidy . . . including, but not limited, to the following:
>
> * * *
>
> (d) Where the [ITA] has conducted an administrative review of the order . . . and determined to increase the net countervailable subsidy rate for any reason, including as a result of the application of best information available or facts available, the [agency] may adjust the net countervailable subsidy rate determined in the original investigation to reflect the increase in the rate.

It is clear from these provisions that, as a general rule in sunset reviews, Congress intended that the rate from the original ITA investigation be referred to the ITC as the net countervailable subsidy likely to prevail upon revocation since it would most accurately reflect how exporters would behave in the absence of an order. The agency did precisely that in evaluating the programs in this matter. Nonetheless, Congress also granted the ITA discretion to adjust the subsidy whenever it determines that a more recently calculated rate would be more appropriate. In reviewing the rates chosen, the court is cognizant of this discretion to decide when an adjustment would aid in reaching a more accurate determination of the net countervailable subsidy likely to prevail. *See* H.R. Doc. No. 103–316, vol. 1, at 890 (a more-recently-calculated rate "may" be more appropriate); *Sunset Policy Bulletin*, 63 Fed.Reg. at 18,876, §III.B.3 (the ITA "may" make adjustments to the net countervailable subsidy, "including, but not limited to", adjusting the rate from the original investigation to reflect any increase from a more recent administrative review). Moreover, the court notes that the word "may" suggests even wider discretion than other provisions which state that the agency "normally will" or "normally will not" change the rate in a given situation. *Compare id. with id.* at 18,875-96, §§ III.A.1–5, III.B.1–2, III.C.1–2. In any event, the court cannot agree with plaintiffs' assertion that the ITA's failure to make the desired adjustment violated the statute.

While the ITA's discretion is not unfettered, this court does not find that the agency's unwillingness to adjust the net subsidy to reflect more recent administrative reviews was arbitrary, capricious, or an abuse of discretion. The ITA has interpreted section III.B.3(d) of the *Sunset Policy Bulletin* more narrowly than its language suggests, exercising discretion not where the subsidy has been increased "for any reason" but rather where there has been "a consistent pattern of increased usage" over the life of the order. *See, e.g., Final Results of Full Sunset Review: Industrial Phosphoric Acid From Israel*, 65 Fed.Reg. 6,163, 6,164–65 (Feb. 8, 2000).

The record does not reflect such a consistent pattern with regard to the programs at issue herein. In their brief, the plaintiffs present comprehensive charts illustrating the subsidy rates found for each exporter and program based on the agency's final determinations over time. While there has naturally been some variance in the rates, including increases, there has been no "consistent pattern of increased usage" for any of the programs that were included in the net countervailable subsidy reported to the ITC. For example, the ITA first countervailed a program described as an "Exemption of Export Credit From Interest Taxes" in the 1993 period of review. *See Certain Iron-Metal Castings From India: Final Results of Countervailing Duty Administrative Review*, 61 Fed.Reg. 64,676, 64,677 (Dec. 6, 1996). The final results of that review included a rate of zero for two individual companies and a program rate of 0.06 percent. *Id.* While the rates for some companies did increase over the two subsequent administrative

reviews, other exporters saw their rates return to 0.06, or even drop from 0.06 to zero. *See Certain Iron-Metal Castings From India; Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 63 Fed.Reg. 64,050, 64,051 (Nov. 18, 1998); *Certain Iron-Metal Castings From India; Final Results of Countervailing Duty Administrative Review*, 62 Fed.Reg. 32,297, 32,298 (June 13, 1997). Other programs, such as "Preferential Post-Shipment Export Financing", experienced even more fluctuation, with rates for most exporters rising and falling several times over the life of the order before settling at or near zero in the more recent reviews. *See, e.g., Certain Iron-Metal Castings From India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 60 Fed.Reg. 4,591, 4,593–94 (Jan. 24, 1995); 61 Fed.Reg. at 64,677; 62 Fed.Reg. at 32,298; 63 Fed.Reg. at 64,050–51. In short, the record evidence does not reveal a consistent pattern of increasing countervailable benefits over the life of the order.[11] And finding a rational connection between the facts found and the choices made in the agency's methodology for determining the net countervailable subsidy, the court cannot conclude that remand is necessary for reconsideration of this issue.

II

In the light of the foregoing, the court concludes that plaintiffs' motion for judgment upon the agency record must be, and it hereby is, granted to the extent of remand to the defendant for reconsideration of the subtraction of IPRS from the net countervailable subsidy without having considered the method of that program's alleged termination or the likelihood of its reinstatement in the absence of any prior administrative determination of that issue. In all other respects, plaintiffs' motion must be, and it hereby is, denied[12].

The defendant may have 45 days for such reconsideration in accordance with this opinion and to report the results thereof to the court, whereupon the plaintiffs may comment thereon within 15 days.

So ordered.

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[11] The court notes that, upon reconsideration of the IPRS program, the agency may come to conclude that there is insufficient evidence of termination to support its previous subtraction of IPRS from the net subsidy rate. If the ITA determines that IPRS should continue to be counted, it should also determine whether any adjustments are thereby warranted.

[12] Plaintiffs' accompanying motion for oral argument is also hereby denied, given the quality of the written submissions on both sides.

(Slip Op. 01–38)

BETHLEHEM STEEL CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, POHANG IRON & STEEL CO., DEFENDANT-INTERVENOR

Court No. 00–03–00116

[Plaintiffs' Motion for Judgment on the Agency Record is granted in part and denied in part. Commerce's Final Determination is remanded in part for further action.]

(Dated April 4, 2001)

Dewey Ballantine LLP. (*John Ragosta, Jennifer Danner Riccardi, Navin Joneja*), Washington, D.C., for Plaintiffs.

Stuart E. Schiffer, Deputy Assistant Attorney General of the United States; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice; *A. David Lafer*, Senior Trial Counsel, International Trade Section, Civil Division, United States Department of Justice; *William L. Olsen*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Cindy Buys*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, Washington D.C., for Defendant.

Kaye, Scholer, Fierman, Hays & Handler (*Donald B. Cameron, Julie C. Mendoza, Brady W. Mills*), Washington, D.C., for Defendant-Intervenor.

OPINION

CARMAN, *Chief Judge*: This action is before the Court on Bethlehem Steel Corporation (Bethlehem Steel) and U.S. Steel Corporation's (U.S. Steel) (collectively, Plaintiffs) Rule 56.2 Motion for Judgment on the Agency Record. At issue are several elements of the final and amended determinations in *Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 Fed. Reg. 73,176 (Dep't Commerce 1999) (*Final Determination*), *Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 65 Fed. Reg. 6,587 (Dep't Commerce 1999) (*Amended Determination*). The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1581(c). The following sections provide an overview of the facts and events precipitating this action, as well as the contentions put forth by the parties.

BACKGROUND

On February 16, 1999, Plaintiffs and certain other domestic producers of cut-to-length steel plate products filed a countervailing duty petition alleging that manufacturers, producers, and exporters of subject merchandise from the Republic of Korea received countervailable subsidies within the meaning of 19 U.S.C. § 1671 (1994). Both the United States International Trade Commission (ITC) and the United States Department of Commerce (Commerce) investigated the allegations for subject merchandise imported during calendar year 1998. *See Final Determination*, 64 Fed. Reg. at 73,177. On April 8, 1999, the ITC determined that the United States' domestic industry was being materially injured or threatened with material injury by imports of

subject merchandise from Korea. *See Certain Cut-to-Length Steel Plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia*, 64 Fed. Reg. 17,198 (Int'l Trade Comm., April 8, 1999). On July 29, 1999, Commerce preliminarily determined that certain Korean producers of subject merchandise had received countervailable subsidies. Commerce issued its final determination on December 29, 1999, and on February 10, 2000, issued an amended determination setting countervailable duty rates at 0.82% *ad valorem* for the Pohang Iron Steel Company (POSCO or Defendant-Intervenor) and 3.26% *ad valorem* for Dongkuk Steel Mill Co. (DSM). *See Amended Determination*, 65 Fed. Reg. at 6,587. Additionally, Commerce set 3.26% as the "all others" rate for companies not party to its investigation. *See id.*

On March 10, 2000, Bethlehem Steel and U.S. Steel filed a summons with this Court initiating suit.[1] In their complaint, Plaintiffs allege several causes of action that can be divided into three distinct claims.[2] Specifically, Plaintiffs allege: (1) Commerce's failure to investigate certain potentially countervailable subsidies renders the *Final Determination* unsupported by substantial evidence and not in accordance with law; (2) Commerce's failure to explicitly address certain issues raised by the parties during the course of its investigation renders the *Final Determination* unsupported by substantial evidence and not in accordance with law; and (3) Commerce's conclusion that the Voluntary Curtailment Adjustment (VCA) program did not confer a specific benefit is unsupported by substantial evidence and not in accordance with law. (Bethlehem Steel Corporation's and U.S. Steel Group, A Unit of USX Corporation's Rule 56.2 Motion for Judgment on the Agency Record, at 2–3) (Plaintiffs' Brief). The United States and the Defendant-Intervenor oppose Plaintiffs' motion.

STANDARD OF REVIEW

This Court will sustain a final determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i) (1994). Substantial evidence is more than a "mere scintilla" of evidence. *Primary Steel, Inc. v. United States*, 834 F. Supp. 1374, 1380 (Ct. Int'l Trade 1993). It consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

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[1] The action filed by Plaintiffs was originally consolidated under CIT No. 00-03-00105 with several other actions challenging the same administrative determination. These actions, however, have been voluntarily dismissed, thus rendering Bethlehem Steel and U.S. Steel the sole remaining plaintiffs.

[2] Plaintiffs initially raised a fourth claim challenging the United States' choice of "benchmark" against which to countervail long-term won-denominated loans given by the Korean government to the Korean steel industry but subsequently withdrew this appeal. (Bethlehem Steel Corporation's and U.S. Steel Group, A Unit of USX Corporation's Reply Brief, at 24.) (Plaintiffs' Reply Brief).

DISCUSSION

Plaintiffs raise three major challenges to Commerce's methods and conclusions in the Final Determination. For clarity, specific facts pertaining to these issues, as well as the parties contentions are set forth below.

A. Commerce's Decisions Not to Investigate Certain Potentially Countervailable Subsidies

Plaintiffs contend Commerce's failure to investigate two potentially countervailable subsidies renders the *Final Determination* unsupported by substantial evidence and otherwise not in accordance with law. Because the facts and legal analysis surrounding these two contentions differ, this section discusses each separately.

1. *Commerce's Decision Not to Investigate the Korean Government's Waiver and Reduction of Import Duties on the Slab Subsidy Program is Unsupported by Substantial Evidence and Otherwise Not in Accordance with Law*

a. *Background*

On July 8, 1999, Plaintiffs (then, petitioners) alleged that the Korean government had provided subsidies to the Korean steel industry through the reduction and waiver of normal import duties on steel slab – the main input into the subject merchandise. Specifically, Plaintiffs alleged the tariff rate was lowered from eight percent to one percent during the first half of 1998 and to three percent during the second half of 1998. The record indicates that POSCO imported slab throughout the first quarter of 1998 and that DSM imported slab during the entire year. (Plaintiffs' Brief, at 28).

On August 11, 1999, Commerce notified petitioners that it did not intend to investigate this subsidy allegation because the allegation was not made at least forty days prior to the July 26, 1999, *Preliminary Determination* as required by 19 C.F.R. § 351.301(d)(4)(i)(A). *See* Memorandum from Team to David Mueller, Director, Office of CVD/AD Enforcement VI, dated August 11, 1999, *reprinted at*, Plaintiff's Appendix, at Tab 13; *see also, Final Determination*, 64 Fed. Reg. at 73,194–95. Commerce further noted that it would not have investigated the allegation even it had been timely made because Plaintiffs "failed to demonstrate how a temporary reduction in a tariff rate for slab would confer a benefit upon the export of subject merchandise." *Final Determination*, 64 Fed. Reg. at 73,195.

b. *Contentions of the Parties*

Plaintiffs contend Commerce is statutorily obligated to investigate subsidies discovered during the course of a proceeding when those subsidies "appear to be countervailable." (Plaintiffs' Brief, at 29, *citing*, 19 U.S.C. §1677(d)). Plaintiffs further contend the record clearly demonstrates that the slab subsidy program meets the requirements for countervailability: (1) government action; (2) benefit; and (3) specificity.

Given the apparent countervailability of the program, Plaintiffs argue Commerce was obligated to investigate their allegation – an obligation that was neither mitigated by the constraints of 19 C.F.R. §351.301(d)(4)(i)(A), nor the availability of duty drawback. Plaintiffs argue that 19 C.F.R. §351.301(d)(4)(i)(A) not only provides Commerce with the discretion to accept allegations filed after the forty day deadline, but that the regulation has been superceded by 19 U.S.C. §1677d and 19 U.S.C. §351.311(b) (1999). Plaintiffs point to 19 U.S.C. §1677d and argue that "the statute required Commerce to include newly discovered subsidy practices in the investigations so long as certain threshold requirements are met, regardless of the stage at which the practices are discovered." (*Id.* at 31.) Similarly, Plaintiffs argue 19 C.F.R. §351.311(b) requires Commerce to include newly discovered subsidy practices within its investigation if sufficient time remains before the scheduled date for the determination." (*Id.*) In the present case, Plaintiffs note that more than 170 days elapsed between the date Commerce was notified of the allegation (July 8, 1999) and the date the *Final Determination* was issued (December 29, 1999). Accordingly, Plaintiffs argue Commerce had more than sufficient time to investigate this allegation and, therefore, its failure to do so is unsupported by substantial evidence and otherwise not in accordance with law.

The United States contends Commerce acted within its discretionary authority when it chose not to investigate the alleged slab subsidy. Although acknowledging that Commerce is statutorily obligated to investigate subsidies discovered during the course of a proceeding, the United States argues "this obligation is tempered by the practical reality that Commerce may simply lack the resources or the time to properly investigate new subsidy allegations made late in the course of the proceeding." (Defendant's Opposition to the Motion for Judgment Upon the Agency Record Filed By Plaintiffs Bethlehem Steel Group and U.S. Steel Group, at 18.) (Defendant's Opposition Brief.) To address this problem, the United States argues Commerce's regulations provide that "when Commerce receives notice during the course of a proceeding of a practice that appears to provide a countervailable subsidy, but Commerce concludes that there is insufficient time to examine the practice, Commerce may defer consideration of the newly discovered practice until a subsequent administrative review." (*Id., citing*, 19 C.F.R. §351.311(c)(2) (1999)). Further, the United States argues that 19 C.F.R. 351.401(d)(4)(i)(A) explicitly states that new subsidy allegations should be made at least forty days prior to the preliminary determination to provide Commerce with sufficient time to investigate the allegation. (*Id.*) The United States argues Commerce properly followed the terms of its regulations and that, regardless of the time between the subsidy allegation and the issuance of the Final Determination, Commerce's decision should be upheld. (*Id.*)

Finally, the United States argues that Commerce correctly decided not to investigate the alleged slab subsidy because Plaintiffs failed to

demonstrate that the subsidy program was countervailable. The United States asserts that "plaintiffs had not demonstrated how the temporary payment of reduced import duties provides a benefit when the duty paid – whatever the amount – is refunded to the company upon export of the final product." (*Id.*) Commerce concluded that "[r]egardless of whether the tariff rate is one percent or eight percent the full amount of the tariff would be returned to the respondents through the duty drawback system when the imported slab is manufactured into plate and then exported as subject merchandise." (*Id.*, at 20.) Because Commerce is obligated to investigate only those programs that "appear to be countervailable" and because the slab subsidy program did not appear to be countervailable, the United States argues Commerce's conclusion is supported by substantial evidence and otherwise in accordance with law.

c. *Analysis*

Commerce is statutorily obligated to investigate subsidies discovered during the course of an investigation that appear to be countervailable. As stated, Plaintiffs alleged that the Korean government improperly provided its domestic steel industry with the benefit of a reduced import tariff on steel slab. On its face, this allegation appears to satisfy the requirement that a party allege government action and specificity. The United States does not challenge either of these aspects of Plaintiffs' allegation. Rather, the United States argues Commerce determined that the tariff reductions did not confer a benefit on the Korean steel industry and, thereby, chose not to investigate the issue.

Commerce based its decision not to investigate, in part, on the conclusion that the Korean steel producers "would be" entitled to duty drawback on the imported slab when the final product was later exported. This conclusion, however, was based on the assumption that the Korean steel producers would actually apply for and obtain duty drawback. Nothing in the record indicates that, at the time Commerce made its decision, the Korean steel producers had applied for or obtained duty drawback on the imported slab. It is well settled that duty drawback is not countervailable. *See, e.g., PPG Indus. Inc. v. United States*, 787 F. Supp. 215, 219 (Ct. Int'l Trade 1992). The Court, however, cannot accept the United States' contention that the mere possibility of drawback renders a subsidy non-countervailable. Although a company may have applied for and obtained duty drawback 100% of the time in past imports, there exists the possibility that in the instant case drawback might not be obtained – *i.e.* deadlines could be missed; applications could be incorrectly submitted, etc. Similarly, although by the time the issue reaches this Court, Commerce may be able to demonstrate that the company had actually obtained duty drawback, this *post hoc* justification cannot salvage the methodological deficiencies present in its initial determination. Accordingly, the Court finds that Plaintiffs properly alleged a subsidy that "appeared to be countervailable."

The Court is also troubled by what appears to be the cursory manner in which Commerce rejected the possibility that the reduction of import duties from eight percent to one percent or three percent provides a countervailable benefit. Even a brief examination of the facts and Plaintiffs' allegation reveals at least one possible countervailable benefit from the reduction of import tariffs even when duty drawback is available. The Korean government reduced the import tariff by at the most seven percent and at the least five percent, thereby reducing the up-front costs associated with importing steel slab. From the date of import until the date duty drawback is received, the importers arguably have the benefit of the time-value of that money. Although the Court draws no conclusions as to whether this actually constitutes a countervailable subsidy, the Court does consider it to reasonably appear countervailable and, therefore, finds that Commerce has a duty to investigate this issue. The Court suggests that on remand Commerce investigate this possibility and any others that would render the reduction of import duties countervailable.

The United States further argues Commerce was not obligated to investigate Plaintiffs' allegation because it was not raised at least forty days prior to the issuance of the preliminary determination. This Court addressed this very issue in *Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141 (Ct. Int'l Trade 2000). In that case, the United States argued Commerce was not obligated to investigate a subsidy allegation because the plaintiffs failed to raise the allegation at least forty days prior to the preliminary determination. *See id.* at 1144. The plaintiffs argued that, despite the untimeliness of its allegation, Commerce was required to investigate the allegation pursuant to 19 C.F.R. §351.311 (2000). *See id.* at 1149. The Court, in finding for the plaintiffs, distinguished between Commerce's duty to investigate a timely allegation pursuant to 19 C.F.R. 351.301(d)(4)(i)(A) and its "independent obligation to investigate potential subsidies discovered during its investigation." *Id.* at 1151. Thus, even in cases where an allegation is untimely under 19 C.F.R. §351.311, the court held Commerce bound to investigate allegations that reasonably appear to be countervailable and are discovered within a reasonable time prior to the completion of its investigation. *Id.*

As stated, 19 C.F.R. §351.311 obligation Commerce to investigate subsidy allegations discovered during an investigation if "sufficient time remains before the scheduled date for the final determination or final results of review." The Court is cognizant that this obligation may allow a petitioner who failed make a timely subsidy allegation under 19 C.F.R. 351.301(d)(4)(i)(A) to correct for its lapse in diligence by presenting the issue to Commerce at a reasonable time prior to the issuance of its final determination. "Congress, however, clearly intended that all potentially countervailable programs be investigated and catalogued, regardless of when evidence on these programs became reasonably available." *Id.*

In the present case, Commerce was made aware of the subsidy allegation in July 1999. The *Final Determination* was not issued until December 1999 thus providing Commerce with at least four full months in which to conduct its investigation. Although the Court recognizes that when Commerce is faced with unreasonably late or extraordinarily complex subsidy allegations it may "lack the resources or the time necessary to investigate" the new allegations, the present case does not implicate these concerns. The fact that Commerce had over four months to investigate what appeared to be a straightforward subsidy allegation forces the Court to conclude that Commerce's failure to so investigate was simply legal error. Accordingly, this Court finds Commerce's decision not to investigate the Korean government's waiver and reduction of import duties on slab to be unsupported by substantial evidence and otherwise not in accordance with law. The issue is remanded to Commerce for further investigation.

2. *Commerce's Decision Not to Investigate Benefits Received by POSCO and DSM Pursuant to Article 23 of the Tax Exemption and Reduction Control Law is Supported by Substantial Evidence and Otherwise in Accordance with Law*

a. *Background*

Article 23 of the Tax Exemption and Reduction Control Law (TERCL) permits a company to include a reserve for overseas business losses in its general losses for the current taxable year. *See Notice of Initiation of Countervailing Duty Investigations: Certain Cut-to-Length Carbon-Quality Steel Plate from France, India, Indonesia, Italy and the Republic of Korea*, 64 Fed. Reg. 12,996, 13,001 (Dep't Commerce, July 26, 1999) (*Notice of Initiation*). The amount of allowable losses is limited to a fixed percentage of foreign exchange receipts from a company's overseas business. (*Id.*)

Plaintiffs, in their petition, alleged this program provided an export-contingent subsidy from which the Korean steel industry directly benefited. (Plaintiffs' Brief, at 45.) Commerce, however, declined to investigate this allegation because the agency had previously determined the program was not specific and, therefore, not countervailable. *See Notice of Initiation*, 64 Fed. Reg. at 13,001, *citing, Final Affirmative Countervailing Duty Determinations and Final Negative Critical Circumstances Determinations: Certain Steel Products from Korea*, 58 Fed Reg. 37,338 (Dep't Commerce, July 9, 1993). Commerce concluded that the program was not *per se* contingent upon exportation because it was generally available to both exporters and non-exporters conducting business in another country. *See id.* at 13,001–002.

Plaintiffs repetitioned Commerce to investigate this issue arguing that "while some companies may benefit from Article 23 in a manner which is not contingent upon exportation (because of overseas business), other companies may receive a benefit wholly contingent upon

exporting." (Domestic Producers Letter from Dewey Ballantine to Department of Commerce, July 8, 1999, p. 6, *reprinted at*, Plaintiffs' Appendix, Tab 11.) (Plaintiffs' July 8, 1999 Letter) To the extent that a benefit was contingent upon exports, Plaintiffs argued the subsidy was countervailable. (*Id.*; Plaintiffs' Brief, at 45.) Commerce again rejected Plaintiffs' petition and declined to investigate. Commerce reiterated that the benefit conferred under this program is not earned on Korean exports but, rather, from foreign receipts earned in conjunction with an overseas business. *See Final Determination*, 64 Fed. Reg. at 73,192.

b. *Contentions of the Parties*

Plaintiffs contend that Commerce violated its duty to investigate as set forth in 19 U.S.C. §1671a(b)(1) (1994). Under this provision, Plaintiffs assert Commerce "is required to initiate a countervailing duty proceeding when a petition is filed on behalf of the domestic industry that: (1) alleges the elements necessary for the imposition of the countervailing duty; and (2) is accompanied by information reasonably available to the petitioner supporting those allegations. Plaintiffs argue the threshold to this duty is extremely low, reflecting Congress' desire that Commerce investigates all allegations unless "it is convinced that the petition and supporting information fail to state a claim upon which relief can be granted." (Plaintiffs' Brief, at 46, *quoting*, S. REP. NO. 96–249, at 47 (1997), *reprinted in*, 1979 U.S.C.C.A.N. 381, 433.) Plaintiffs note this Court has interpreted the statute's legislative history to "imply" that, "Commerce [can] decline to initiate investigations only where they are 'clearly frivolous' or where the petitioner has not provided information reasonably available to it." (Plaintiffs' Brief, at 46, *quoting*, *Torrington Co. v. United States*, 772 F. Supp. 1284, 1288 (Ct. Int'l Trade 1991).) As such, Plaintiffs urge this Court to find Commerce's refusal to investigate unsupported by substantial evidence and otherwise not in accordance with law.

The United States contends that Plaintiffs mischaracterize the Article 23 program in that "the program... is simply not contingent upon export performance" and "simply because a person may have some overseas business losses that are connected to exports does not convert the program into one that is contingent upon exports." (Defendant's Opposition Brief, at 25–26.) Accordingly, the United States argues that Plaintiffs' contentions must fail. (*Id.*)

c. *Analysis*

Although Plaintiffs correctly cite Commerce's statutory obligation, they fail to address this Court's holdings interpreting the scope of that obligation. This Court has held that "Commerce has discretion in deciding whether to reinvestigate a program previously found not countervailable in a final agency determination in the absence of sufficient new evidence." *PPG Industries, Inc. v. United States*, 787 F. Supp. 215, 220 (Ct. Int'l Trade 1992), *quoting, PPG Industries, Inc. v. United States*, 746 F. Supp. 119, 135 (Ct. Int'l Trade 1990) (internal quotations omitted). Additionally, this Court has sustained Commerce's

requirement that "when allegations concern a program previously held non-countervailable... a petition [must] contain evidence of changed circumstances or provide a sufficient basis to believe that producers receive a disproportionate share of the benefits under these programs..." before it will begin an investigation. *Delverde Srl v. United States*, 989 F. Supp 218, 222 (Ct. Int'l Trade 1997), *vacated on different grounds by, Delverde Srl v. United States*, 202 F.3d 1360 (Fed. Cir. 2000). This requirement is a reasonable interpretation of Commerce's statutory obligation and is wholly consistent with Congress' expressed intent. Through this requirement Commerce, in essence, has placed a burden of persuasion on petitioners and defined what constitutes a sufficient claim in cases where countervailing duties are sought after a prior determination had found an alleged subsidy to be non-countervailable.

The record does not indicate, nor do Plaintiffs argue, that Commerce was provided with evidence of sufficient weight to warrant reinvestigating the alleged subsidy. To the contrary, in their petition Plaintiffs simply stated that TERCL Article 23 is "an export incentive" and that Commerce's prior determination that the program is non-countervailable "should be abandoned." No support was provided for this bald assertion. (Plaintiffs Petition for the Imposition of Countervailing Duties, February 16, 1999, p. 86, *reprinted at*, Plaintiffs' Appendix, Tab 1.) Similarly, in its letter to Commerce asking for reconsideration of the issue, Plaintiffs simply "remind[ed] the Department" of the details contained in its initial petition. (Plaintiffs' July 9, 1999 Letter, at p. 6.) Whatever else it might be, this information is not evidence of changed circumstances, nor is it demonstrative of the Korean steel industry's disproportionate benefit under the subsidy program. Accordingly, the Court finds Commerce reasonably concluded that no new evidence existed regarding the TERCL Article 23 program and properly exercised its discretion in deciding not to reinvestigate.

B. Commerce's Failure to Address Certain Potentially Countervailable Subsidies

Plaintiffs contend that Commerce's failure to address certain potentially countervailable subsidies renders the *Final Determination* unsupported by substantial evidence and not in accordance with law. (Plaintiffs' Brief, at 2–3). Specifically, Plaintiffs contend Commerce's failure to address: (1) the infrastructure subsidy benefits received by POSCO at Asan Bay; (2) the waiver or reduction of import duties on steel making equipment imported by the Korean producers; and (3) certain benefits received by DSM relating to its purchase of land at Asan Bay, creates an inadequate record from which the Court can review the agency's decisions. (*Id.*, at 6).

1. *Commerce's Failure to Address the Potentially Countervailable Subsidy Benefits Received by POSCO at ASAN Bay and the*

Potential Benefits Associated with the Reduction or Waiver of Import Duties on Steel Making Equipment is Unsupported by Substantial Evidence and Otherwise Not in Accordance With Law

The United States does not contest Plaintiffs' contentions with respect to the potential infrastructure subsidy benefits received by POSCO at Asan Bay and the potential benefits received from the waiver or reduction of import duties on steel making equipment. To the contrary, the United States concedes that "the *Final Determination* does not explain Commerce's reasoning with respect to [these] alleged subsid[ies]" and that these issues "should be remanded to the Department so that it may explain its reasoning on remand." (Defendant's Opposition Brief, at 14, 15.)

Although Defendant United States acknowledges Commerce's failure to adequately explain its reasoning with respect to these two issues, Defendant-Intervenor argues this failure is not fatal to the *Final Determination's* validity. Defendant-Intervenor contends it is well-settled that a court may "uphold an agency's decisions of less than ideal clarity if the agency's path may be reasonably discerned." (Response Brief of Defendant-Intervenor Pohang Iron and Steel Co., Ltd., in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record, at 44) (Defendant-Intervenors Opposition Brief). Defendant-Intervenor then argues the *Final Determination* provides sufficient evidence to allow the Court to discern Commerce's reasoning. "While Commerce did not explicitly state that it found no subsidy to POSCO from the [Government of Korea's] infrastructure investments at Asan Bay, Commerce was quite clear that it was satisfied that the information requested with respect to these investigations was provided and verified." (*Id.*, at 45–46, *citing*, *Final Determination* 64 Fed. Reg., at 73,183.) Additionally, Defendant-Intervenor argues Commerce "briefly described its investigation of the alleged infrastructure subsidies" and presented facts regarding the Korean government's infrastructure investments at Asan Bay which "impl[y] that Commerce... did not consider... the infrastructure investment... as relevant to its subsidy inquiry with respect to POSCO." (*Id.*, at 45, 46.)

The Court rejects Defendant-Intervenor's argument. Commerce is statutorily obligated to provide "an explanation of the basis for its determination that addresses relevant arguments made by interested parties who are parties to the investigation... concerning the establishment of... a countervailable subsidy." 19 U.S.C. §1677f(i)(3)(A)(1994). The legislative history makes clear that Congress intended Commerce to "specifically reference in [its] determinations factors and arguments that are material and relevant or... provide a discussion or explanation in the determination that renders evidence of the agency's treatment of a factor or argument." Although Defendant-Intervenor is correct that courts may uphold an agency's decision where, despite a lack of overall clarity, the path leading to its conclusion is reasonably discernable, *see Micron Technology, Inc. v. United States*, 117 F.3d

1386, 1400 (Fed. Cir. 1997), this Court cannot discern, nor can it "imply," such a path from the brief description contained in the *Final Determination*. Accordingly, the Court remands these two issues to Commerce for further explanation.

2. *The United States Failure to Address Certain Financial Benefits Received by DSM Relating to its Purchase of Land at Asan Bay is Unsupported by Substantial Evidence and Otherwise Not in Accordance with Law*

a. *Background*

During the course of its investigation, Commerce discovered that the Korean government sold land at Asan Bay to DSM at a price substantially below market value. (U.S. Department of Commerce Internal Memorandum from the Team to D. Mueler, Case No. C-580-837, at 7–8, *reprinted at*, Plaintiffs' Appendix, Tab. 20). The price differential was the result of a reduction of the property's purchase price by the Korean government, as well as a waiver of certain management fees attendant to the land. *See Final Determination*, 64 Fed. Reg. at 73,184. Because these benefits were specific to DSM, Commerce calculated their value by deducting the actual purchase price from the original (market) value of the land. *See id*. The difference in amount was treated by Commerce as a "grant" from the Korean government that conveyed a 0.48% *ad valorem* countervailable subsidy to DSM. *See id*.

b. *Contentions of the Parties*

Plaintiffs do not challenge Commerce's methodology in calculating this subsidy, but contend Commerce improperly failed to consider an additional benefit conveyed to DSM by the Korean government. (Plaintiffs' Brief, at 22.) Upon purchase of the Asan Bay property, the Korean government refunded money to DSM. (Korean Respondent's Rebuttal Brief, Case No. C-580-837, at 52–54, *reprinted at*, Plaintiffs' Appendix, Tab 24.) This refund allegedly accounted for interest that DSM could have earned on money paid to the Korean government in advance of the Asan Bay purchase. (Id.) Plaintiffs argue that not only did DSM pay "a lesser price for the land at Asan Bay than had other purchasers, but a significant portion of the purchase price... was returned to DSM by the [Korean government] in an interest rebate to account for the time value of DSM's money." (Plaintiffs' Brief, at 21.) "To account properly for the countervailable benefit from discounted land at Asan bay, Commerce needs to... include in its calculation the refund of interest paid by the [Korean government] to DSM." (Plaintiffs' Brief, at 23.) Failure to do so arguably caused Commerce "to undervalue the amount of the benefit provided to DSM," therefore, "necessitating a remand for the purpose of recalculating the benefit received." (*Id*.)

The United States challenges Plaintiffs' standing to raise this issue. Specifically, the United States argues that this issue was not pre-

sented to Commerce during its investigation. (Defendant's Opposition Brief, at 16.) Therefore, "[P]laintiffs failed to exhaust their administrative remedies and cannot raise this issue before the Court." (*Id.*) For the Court to now entertain the issue arguably would create a situation in which the Court "improperly usurp[ed] the agency's function." (*Id.* at 16). Additionally, the United States argues that even if the issue had been raised, there would have been insufficient time for Commerce to act fully investigate it prior to issuing the Final Determination. (*Id.*)

c. *Analysis*

The United States is correct that, where appropriate, this Court requires a party to exhaust its administrative remedies as a prerequisite to jurisdiction. *See* 28 U.S.C. § 2637(d) (1988). It is well established that "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *See Budd Co. v. United States*, 773 F. Supp. 1549, 1554 (Ct. Int'l Trade 1991), *quoting, Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946).

The evidence before the Court, however, clearly establishes that Plaintiffs properly placed the interest-refund issue before Commerce. On December 3, 1999, the Korean respondents in their rebuttal brief indicated that the purchase price of the land at Asan Bay had been reduced by, *inter alia*, an amount which represented interest accrued on "advance payments" made by DSM to the Korean government. (Plaintiffs' Reply Brief, at 7, *citing*, Korean Producers' DOC Rebuttal Brief, at 52–53, C.R. 42, P.R. 135.) On December 6, 1999, in a public hearing before Commerce, Plaintiffs explicitly raised the discount issue and asserted its countervailability. Specifically, Plaintiffs stated "DSM claims that under the Industrial Site Law [it] was entitled to a refund of interest to account for the time value of its money paid pursuant to the terms of the contract as an installment payment. That refund is a subsidy." (Public Hearing on the Countervailing Duty Investigation of Certain Cut-to-Length Steel Products from Korea, at 35, *reprinted at*, Plaintiffs Reply Brief Appendix, 13.) Throughout the investigation Plaintiffs requested that Commerce countervail the entire amount of the discount received in conjunction with the Asan Bay land purchase. Plaintiffs could not have raised the interest-refund issue any sooner because, as stated, the Korean respondents only provided the requisite information in on December 3, 1999. Upon receipt of this information, Plaintiffs timely tailored their countervailing duty request to include the interest-rebate subsidy. Accordingly, the Court finds that Plaintiffs properly placed this issue before Commerce, thereby exhausting their administrative remedies and rendering the issue proper for appeal.

The Court additionally finds the United States argument that Plaintiffs "cannot raise [the interest-rebate issue] in this proceeding" but

"may raise [it] in an administrative review of the order" to be without merit. (Defendant's Opposition Brief, at 16.) The Court recognizes that 19 C.F.R. §351.311(c) grants Commerce the authority to defer consideration of certain subsidy allegations by stating "[i]f the Secretary concludes that insufficient time remains before the scheduled date for the final determination or final results of review to examine the practice, subsidy, or subsidy program... the Secretary will... (2) During an investigation or review, defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any." This authority, however, cannot be invoked as a post hoc rationalization for Commerce's actions. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (finding that "courts may not accept appellate counsel's *post hoc* rationalizations for agency's decisions."). At no point in the proceeding below did Commerce invoke this regulation as justification for deferring consideration of this issue. Similarly, nothing in the *Final Determination* or the record indicates that Commerce concluded this allegation was raised too late for proper consideration. To the contrary, the *Final Determination* is silent as to why Plaintiffs' allegations were rejected and discusses only the base methodology used to partially countervail the Asan Bay subsidies. Accordingly, the Court cannot accept the United States' argument and finds that Commerce's failure to address the interest-rebate subsidy in its *Final Determination* to be unsupported by substantial evidence and otherwise not in accordance with law. This issue is remanded to Commerce for further consideration.

C. Commerce's Conclusion that the Voluntary Curtailment Adjustment Did Not Confer a Specific Benefit is Supported by Substantial Evidence and Otherwise in Accordance with Law

a. *Background*

During the period of investigation the government-owned Korea Electric Power Company (KEPCO) provided four types of discounts to its customers. *See Final Determination*, 64 Fed. Reg. at 73,182. Relevant to this case, KEPCO afforded customers the opportunity to participate in a Voluntary Curtailment Adjustment (VCA) program. Under this program, general, educational, or industrial users with a contract demand of 1000 kilowatts or more that voluntarily agreed to curtail their usage by at least 20% during certain designated times were entitled to a basic discount of 110 kilowatts per hour. *See id.* at 73,186. In their petition, Plaintiffs alleged the Korean steel industry was, in fact, a "dominant" user of this program and thus received a countervailable subsidy. Commerce, however, concluded that the subsidy provided by this program was not specific and, therefore, found the VCA to be non-countervailable. *See id.*

b. *Contentions of the Parties*

Plaintiffs contend Commerce improperly applied the statutory specificity test in determining the VCA to be non-specific. Plaintiffs note

that "Commerce's governing statute details the process by which the agency is to determine whether or not a particular benefit is [*de facto*] specific." (Plaintiffs' Brief, at 35.) Under the statute, a program is *de facto* specific when:

> (1) Actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number;
> (2) An enterprise or industry is a predominant user of the subsidy;
> (3) An enterprise or industry receives a disproportionately large amount of the subsidy; or
> (4) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

19 U.S.C. § 1677(5)(A)(D)(iii) (1994). Plaintiffs argue "the existence of any one of these factors necessarily warrants a finding of *de facto* specificity." (Plaintiffs' Brief, at 36.) Plaintiffs further argue "Commerce's regulations stipulate that the agency is to engage in a sequential analysis of these criteria and that 'if a single factor warrants a finding of specificity, the Secretary will not undertake further analysis.'" (*Id.* at 36, *quoting*, 19 C.F.R. §351.502(a) (1999).) Because Commerce's specificity analysis of the VCA program focused solely on whether the Korean steel industry was the dominant user, Plaintiffs argue Commerce's conclusion violates 19 U.S.C. § 1677(5)(A)(D)(iii) and, therefore, is contrary to law. (*Id.* at 40.)

Additionally, Plaintiffs argue the record clearly indicates that the Korean steel industry was not only the dominant user, but also that it received a disproportionately large amount of a subsidy that was, in fact, granted to a very small number of recipients. (*Id.* at 35–37.) Based on this record evidence, Plaintiffs argue Commerce's conclusion is unsupported by substantial evidence.

The United States contends Commerce properly determined that the VCA was a generally available program and, therefore, was non-countervailable. In support of its contention, the United States argues Commerce's conclusion was consistent with a prior determination in which a similar Canadian program was found to be non-specific. (Defendant's Opposition Brief, at 21.) In *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, 57 Fed. Reg. 30,946 (July 14, 1992), Commerce described the manner in which it analyzes energy discounts provided to large consumers of electricity. Specifically, Commerce stated "if the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other industries which purchase comparable amounts of electricity, we would probably not find a countervailable duty." *Id.* at 30,950.

In the present case, the United States argues all of the VCA program participants received the same discount, thereby indicating that

the rate charged was consistent. (United States' Opposition Brief, at 21.) Additionally, the United States argues that more than sixteen different industries participated in the VCA program, indicating a substantial diversity of involvement. (*Id.*) Finally, the United States argues that the steel industry is one of the largest industries in Korea and thus would be expected to receive the greatest amount of benefit from the VCA program. (*Id.*) The actual percentage of the benefit conferred upon the steel industry, therefore, was not "disproportionately" large; nor did it render the steel industry a "dominant" participant in the VCA program. As such, the United States argues that, because the terms "dominant" and "disproportionate" are not defined in the statute, "Commerce's reasonable interpretation... is entitled to deference and should be upheld by this Court." (*Id.* at 22.)

c. *Analysis*

The manner in which Commerce is to apply the *de facto* specificity test is clearly set forth in 19 C.F.R. §351.502(a) and has been interpreted by the courts. *See e.g., PPG Industries Inc., v. United States*, 928 F.2d 1568, 1577 (Fed. Cir. 1991); *Cabot Corp. v. United States*, 620 F. Supp. 722, 732 (Ct. Int'l Trade 1985). Commerce must on a case-by-case basis sequentially analyze each of the four factors listed in 19 U.S.C. §1677(5)(A)(D)(iii) and determine whether any of the factors is present. The *de facto* specificity test is concerned with the effect of benefits provided to individual recipients rather than on the nominal availability of benefits and, therefore, the presence of a single factor mandates a finding of *de facto* specificity. *See Cabot*, 620 F. Supp. at 732.

A review of the record indicates, although not with crystal clarity, that Commerce engaged in such a sequential review and reasonably concluded that the VCA program was not specific. Commerce found that the "discounts provided under the VCA program were distributed to a large number of customers, across a wide range of industries." *Final Determination*, 64 Fed. Reg. at 73,186. This finding was based largely on information provided by the Korean government showing that during the period of investigation 190 customers received benefits under the VCA program and that of these companies only 31 were in the iron and steel industry. (Exhibit M-9 to the Korean Government's May 11, 1999 Questionnaire Response, *reprinted at*, United States' Appendix, Tab 2.) Additionally, the information indicates that the iron and steel industry represented only one of over sixteen industries to have received benefits under the VCA program during the period of investigation. (*Id.*) This information constitutes substantial evidence supporting Commerce's conclusion that the discounts were provided to a large number of participants – a conclusion that demonstrates consideration of the first factor of the *de facto* specificity test.

Commerce next determined that "POSCO and DSM were not dominant or disproportionate users of [the VCA] program." *Final Determination*, 64 Fed. Reg. at 73,186. The United States acknowledged the "steel industry received more benefits in monetary terms pursuant

to the program than any other sector in 1998," but, contrary to Plaintiffs' assertions, argues this is not determinative. (United State Opposition Brief, at 22.) The Court agrees with the United States. The mere fact that the steel industry received a greater monetary benefit from the program than did other participants is not determinative of whether that industry was "dominant" or receiving "disproportionate" benefits. In virtually every program that confers benefits based on usage levels one or more groups will receive a greater share of the benefits than another group. To impose countervailing duties on an industry where disparity alone is demonstrated, but no evidence is produced indicating that the benefit was industry specific, is anathema to the purpose of the countervailing duty laws. Although the steel industry received over 51% of the financial benefits afforded by the VCA program during the period of investigation, there is nothing in the record to indicate this percentage was disproportionately higher than would be expected. Commerce, consistent with its prior practice, examined the Korean steel industry and concluded that one of its inherent characteristics was the large consumption of electricity. Thus, when Commerce examined the Korean steel industry's electricity usage, and the attendant benefits derived from the VCA program, it found them to be neither "dominant" nor "disproportionate."

Because neither "dominant" nor "disproportionate" are defined in the relevant statute, this Court is obligated to defer to Commerce's reasonable interpretation thereof. The Court cannot find Commerce's methodology for determining a "dominant" or "disproportionate[ly]" large consumer of electricity to be unreasonable. To the contrary, it reflects the commercial realities of the industry in question. Accordingly, Commerce properly considered the second and third factors of the *de facto* specificity test.

Finally, as noted above, Commerce stated that for large consumers of electricity a countervailable subsidy will not be found if the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than similarly situated consumers. Commerce further indicated that "electricity tariffs are generally based upon the type and amount of consumption of electricity" and that typically "utility rates will not be countervailed solely because the rates are provided to large consumers." *Final Determination*, 64 Fed. Reg. at 73,192. The record indicates that under the VCA program all eligible participants receive the same discount regardless of industry. This clearly indicates uniformity of treatment among all parties and provides substantial record support for Commerce's conclusion that the VCA program was non-specific. It also demonstrates the agency properly considered the final factor of 19 U.S.C. § 1677(5)(A)(D)(iii) which requires Commerce to examine whether the administering authority has favored one industry over another in the discretionary granting of subsidies. Where, as with the VCA program, the eligibility requirements are explicitly stated and all parties receive the same discount, there

can be no exercise of discretion and no favorable treatment afforded to any one industry. Accordingly, the Court finds Commerce's conclusion that the VCA program is non-countervailable to be supported by substantial evidence and otherwise in accordance with law.

CONCLUSION

For the reasons stated above, the Court grants Plaintiffs' motion for judgment on the agency record in part and denies the motion in part. The *Final Determination* is remanded so that Commerce may: (1) properly address the infrastructure subsidy benefits received by POSCO at Asan Bay; (2) properly address the waiver or reduction of import duties on steel making equipment imported by the Korean producers; (3) investigate the Korean government's waiver or reduction of import duties on slab; and (4) determine whether the rebate of money associated with the Asan Bay land purchase is a countervailable subsidy and, if so, to adjust the countervailing duty rate accordingly. In all other respects, the *Final Determination* is sustained as supported by substantial evidence and otherwise in accordance with law.

(Slip Op. 01–39)

TAIWAN SEMICONDUCTOR MANUFACTURING CO., LTD., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR

Court No. 98–05–02184

Plaintiff, Taiwan Semiconductor Manufacturing Company, Ltd. (TSMC) has challenged the United States Department of Commerce's (Commerce) *Response to Court Remand Pursuant to Taiwan Semiconductor Manufacturing Company, Ltd., v. United States*, Slip Op. 00–48 (Court Order, May 2, 2000) (*Remand Response*). Plaintiff's challenge is in furtherance of TSMC's original motion for Judgment Upon the Agency Record pursuant to Rule 56.2 of the Rules of this Court, challenging Commerce's final determination in the antidumping duty investigation excluding TSMC as a producer in *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 Fed. Reg. 8909 (Feb. 23, 1998) (*Final Determination*), as amended by *Notice of Amended Final Determination and Antidumping Duty Order of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 Fed. Reg. 18,883 (Apr. 16, 1998) (*Amended Final Determination*). Absent a response by Defendant, this Court has treated Defendant as being opposed to Plaintiff's challenge to Commerce's *Remand Response*.

Upon Plaintiff's challenge, and upon the opposition of Defendant and Defendant-Intervenor thereto, Plaintiff's motion is denied. The *Final Determination* of Commerce, as amended by the *Amended Final Determination* and Remand Response, is sustained in all respects. Plaintiff's motion for stay of further proceedings is denied. This case is dismissed.

(Dated April 4, 2001)

White and Case LLP (*Christopher F. Corr, Robert G. Gosselink*), Washington, D.C., for Plaintiff.

Stuart E. Schiffer, Deputy Assistant Attorney General of the United States; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Kenneth S. Kessler*, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Melanie A. Frank*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

Hale & Dorr LLP (*Michael D. Esch, Gilbert B. Kaplan, Paul W. Jameson, Chris R. Revaz*), Washington, D.C., for Defendant-Intervenor.

OPINION

CARMAN, *Chief Judge*: Upon Plaintiff's challenge to the *Remand Response* in furtherance of Plaintiff's original motion for Judgement Upon the Agency Record, and upon the opposition of the Defendant and Defendant-Intervenor thereto, Plaintiff's motion is denied, and this Court sustains in all respects Commerce's *Final Determination*, as amended by the *Amended Final Determination and Remand Response*.

BACKGROUND

Commerce initiated antidumping duty investigations regarding Static Random Access Memory Semiconductors (SRAMs) from the Republic of Korea and Taiwan for the period January 1, 1996, through December 31, 1996. *See Initiations of Antidumping Duty Investigations: Static Random Access Memory From the Republic of Korea and Taiwan*, 62 Fed. Reg. 13,596 (March 21, 1997) (*SRAMs from Taiwan*). On April 16, 1997, Commerce issued questionnaires to twenty-two companies thought to be producers or exporters of SRAMs in Taiwan. Information from eighteen responding companies indicated a lack of administrative resources to investigate all SRAM producers and exporters. Therefore, pursuant to 19 U.S.C. § 1677f-1(c)(2)(B) (1994),[1] Commerce limited the number of mandatory respondents (producers or exporters under the statute) in the investigation. On May 21, 1997, Commerce selected five companies as mandatory respondents in the investigation: Integrated Silicon Solutions, Inc., TSMC, Winbond Electronics Corporation, Alliance Semiconductor Corporation, and United Microelectronics Corporation. (Memorandum of May 21, 1997, from the Team to Louis Apple, Acting Director, Import Admin., Pl. Pub. Exh. 3, at 2 (Respondent Selection Memorandum).)

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[1] 19 U.S.C. § 1677f-1(c)(2)(B) (1994) states, in pertinent part:

(c) Determination of dumping margin

...

(2) Exception

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) [determining weighted average dumping margins for every known exporter and producer of subject merchandise] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to

...

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

TSMC is the world's largest semiconductor foundry. In making its selection, Commerce noted an apparent double counting of certain TSMC indirect sales to the United States and questioned whether to attribute the sales to TSMC or to TSMC's design house customer for whom TSMC manufactured the SRAM wafers. *See id.* at 2 n.3. The issue remained unresolved as Commerce proceeded with its investigation. After TSMC filed its responses on June 16, 1997, Commerce solicited supplemental information from TSMC regarding design and foundry roles in the SRAM production process and sale of merchandise.

In a September 23, 1997 memorandum, Commerce concluded that a foundry such as TSMC that manufactures processed SRAM wafers according to designs provided by a design house is not considered a producer under the statute because the design house has ultimate control over how the merchandise is produced and the manner in which it is ultimately sold. (Memorandum of September 23, 1997 from the Team to Louis Apple, Director, Import Admin., Pub. Doc. 346, Pl. Pub. Exh. 4, at 9, 11 (Foundry Elimination Memorandum).) On October 1, 1997, Commerce reversed its selection of TSMC as a mandatory respondent. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors From Taiwan*, 62 Fed. Reg. 51,442, 51,444 (Oct. 1, 1997) (*Preliminary Determination*).

TSMC is considered a subcontractor. Therefore, in both the Foundry Elimination Memorandum and *Preliminary Determination*, Commerce applied its policy toward subcontractors or tollers as set forth in proposed regulation 19 C.F.R. § 351.401(h) and its preamble.[2] The proposed regulation states Commerce "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale of the subject merchandise"; in addition, the preamble requires control of production. *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7330, 7381 (1996) (proposed Feb. 27, 1996) (codified at 19 C.F.R. pt. 351) (*Proposed Rules*). Commerce reasoned that because TSMC did not own the SRAM design, which imparts the essential features of the product, TSMC did not own, control the relevant sale of, or control the production of, the subject merchandise. *Preliminary Determination*, 62 Fed. Reg. at 51,444.

TSMC filed unsolicited comments with Commerce on October 14, 1997, justifying its standing as a producer respondent and requesting that Commerce reconsider its preliminary determination. On October 29, 1997, Commerce informed TSMC that it would not alter TSMC's non-producer status and would therefore not engage TSMC in the verification process. On February 23, 1998, Commerce reiterated its preliminary determination to exclude TSMC from the investigation in the *Final Determination*, as amended.

On May 15, 1998, TSMC moved for Judgment Upon the Agency

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[2] Proposed regulation 19 C.F.R. § 351.401(h) was finalized May 19, 1997. The final regulation excludes the preamble. *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27,296 (May 19, 1997).

Record challenging Commerce's exclusion of TSMC as a producer in its *Final Determination*, as amended. Among its contentions, TSMC argued a misapplication by Commerce of proposed regulation 19 C.F.R. § 351.401(h), contrary precedent, required verification, and violation of rules of procedural fairness.

On March 31, 1999, the United States Government (United States) opposed TSMC's motion. The United States argued that by not specifying the criteria for identifying a producer, Congress gave Commerce discretion to devise its own methodology. (Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency Record at 26 (Def's Memo in Opposition).) The United States asserted Commerce exercised its discretion consistent with proposed regulation 19 C.F.R. § 351.401(h) and its preamble, and that substantial evidence on the record indicated the design house's ownership of the SRAMs design gave it control of the relevant sale of and control of production of the subject merchandise, while TSMC's non-ownership of the design minimized its role in the production process. *See id.* at 29–31. The United States argued that although section 351.401(h) properly guided Commerce, the proposed regulation did not "address all circumstances in which a toller would not be deemed a producer."[3] *Id.* at 35. The United States claimed that TSMC's legal title to the SRAM wafers lessened the design house's risk of loss while TSMC processed the wafers, but it did not lessen the significance of the design house's continuous ownership of the underlying intellectual property rights. *Id.* at 39–40. The United States also claimed Commerce did not need to verify TSMC's data once TSMC was no longer a selected respondent. *See id.* at 51. Finally, the United States stated Commerce violated no requirements for procedural fairness because TSMC had ample opportunity to explain why it should be considered a respondent, and Commerce may make changes during an administrative proceeding to reach an accurate conclusion. *See id.* at 55–56.

On May 2, 2000, this Court remanded the *Final Determination*, as amended, to Commerce to clarify: (1) its reasons for choosing sale by the design house as the "relevant sale"; and (2) its analysis, under its subcontractor practice, of TSMC's producer status in the context of TSMC's direct sales to the United States. *See Taiwan Semiconductor Manufacturing Co. v. United States*, 100 F.Supp. 2d 1109, 1125–1126 (Ct. Int'l Trade, 2000) (*Taiwan Semiconductor*). A familiarity with this Court's opinion in *Taiwan Semiconductor* is presumed.

In its *Remand Response*, Commerce reiterated its reliance upon the proposed regulation and its preamble. Commerce clarified its interpretation of "relevant sale," defining it as the "first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *Remand Response* at 7–8. Because the design house

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[3] For support, the United States pointed to a "totality of circumstances" standard Commerce first applied after its final determination in the instance case. *See Taiwan Semiconductor Manufacturing Co. v. United States*, 100 F.Supp. 2d 1109, 1120, fn.13 (Ct. Int'l Trade, May 2, 2000) (*Taiwan Semiconductor*).

owns the design, its sale price represents the full value of the subject merchandise by including the value of both design and fabrication. *See id.* at 10. Commerce stressed the essential nature of design in this specific proceeding, noting that design determines the ultimate characteristics, performance, and purposes of the subject merchandise. *See id.* at 11. Commerce explained that by controlling how the foundry uses the design in production and the distribution to the marketplace of products incorporating the design, the design house directs production of the subject merchandise. *See id.* at 11.

Although Commerce acknowledged the significance of the fabrication performed by TSMC, it stated that TSMC's price does not reflect all relevant elements of value because the subcontractor only performs a segment of the manufacturing process, and this at the direction of another entity. *See id.* at 8–9. Commerce reasoned that because TSMC does not bear at least one element of cost essential to production, its price represents only a portion of the value of the subject merchandise. Commerce considered the transaction between TSMC and the design house to be a sale of inputs and services rather than a sale of subject merchandise. *See id.* at 9–10.

In keeping with this interpretation of "relevant sale," Commerce next rejected TSMC as a producer within the context of TSMC's direct sales to design houses in the United States because only the location of the producer distinguished TSMC's direct from indirect sales. *See id.* at 12. Commerce stated that in order to be a producer, the foundry must use its own designs or those licensed from another company; TSMC offered no evidence of operating differently for contractors in the United States than it operated for contractors located in Taiwan. *See id.* at 13.

On July 11, 2000, in furtherance of Plaintiff's original 56.2 Motion, TSMC challenged Commerce's determination to exclude TSMC as a respondent producer in the underlying investigation. (Response of Taiwan Semiconductor Manufacturing Company, Ltd. to the Remand Views Submitted by the U.S. Department of Commerce to the Court on June 30, 2000 (Pl.'s Resp. to Remand).)

Jurisdiction and Standard of Review

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). This Court will sustain Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Contentions of the Parties

A. *Plaintiff*

TSMC makes five criticisms of Commerce's *Remand Response*. First,

TSMC contends that Commerce failed to meet its legal standard for determining that a subcontractor is not a manufacturer or producer under Section 351.401(h). (Pl.'s Resp. to Remand at 3.) According to TSMC, a subcontractor must satisfy two requirements in order to be considered a non-producer: (1) non-ownership of the subject merchandise; and (2) lack of control of the relevant sale of the subject merchandise. *See id.* at 3. TSMC claims that because it retains legal title to the subject merchandise until its sale to the design house, TSMC fails to meet both requirements for non-producer status and must therefore be a producer. *See id.* at 3–4. Accordingly, TSMC asserts it need not prove control of relevant sale. *See id.* at 4.

Second, TSMC nonetheless claims to control the relevant sale, which it defines as the first sale of the subject merchandise to an unaffiliated person. *See id.* TSMC distinguishes customer payments made to TSMC pursuant to a sales contract from a contractor's payment of a service fee to a non-producer subcontractor. *See id.*

Third, TSMC claims Commerce's application of its "price setter" theory fails for four reasons: (1) by transferring title to the buyer for consideration, TSMC sold the subject merchandise itself rather than a mere service or input; (2) TSMC's decision to be bound by freely negotiated contract terms does not waive its control of sales; (3) no law or precedent requires the export price to support all elements of value; rather, in investigations involving custom-made products, Commerce has treated the entity that actually manufactured the product as the producer; and (4) it would create unsustainable precedent by requiring complex economic analysis of whether all cost elements "passed through" to the customer in the price, thus exposing Commerce to challenges that it treated the wrong company as producer and imposing an unpredictable standard upon exporters and importers as to the identity of a producer in a given investigation. *See id.* at 6–13.

Fourth, TSMC faults Commerce for labeling as temporary and partial TSMC's ownership of the subject merchandise, asserting a lack of evidence for Commerce's claim that TSMC takes title for indemnification purposes. *See id.* at 13–15. Because TSMC's sales contract covers the subject fabricated wafer, TSMC claims Commerce incorrectly characterized the sale as one of inputs and services and that because TSMC owns the fabricated wafer entirely, Commerce incorrectly claimed partial ownership by the design house. *See id.*

Fifth, TSMC asserts Commerce did not adequately respond to the Court's request for clarification under the statute and existing practice. *See id.* at 15–16. TSMC criticizes Commerce for inadequately defending its formulation of "relevant sale" as the downstream sale by TSMC's customers and argues that under Commerce's formulation, a subcontractor could never qualify as a producer under 19 C.F.R. § 351.401(h), rendering the standard nugatory. *See id.*

B. *Defendant-Intervenor*

Defendant-Intervenor contends: (1) Commerce fully responded to

the Court's remand order; and (2) Commerce's *Remand Response*, by receiving approval from the lead official responsible for administering the antidumping laws at the Department of Commerce "represents the considered policy decision of the Department of Commerce." (Comments of Defendant-Intervenor Micron Technology, Inc. on Defendant's Response to Court Remand.)

C. *Defendant*

Absent a response by Defendant, this Court treats Defendant as being opposed to Plaintiff's challenge to Commerce's *Remand Response*.

ANALYSIS

A. *Commerce's interpretation of "producer" is based upon a reasonable construction of the antidumping statute.*

Commerce based its determination upon a reasonable construction of the antidumping statute. Because the statute lists no criteria by which to determine producer status,[4] the Court must consider whether the agency's determination "is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In doing so, the Court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11.

Commerce's construction of the statute is found in proposed regulation 19 C.F.R. §351.401(h) and its preamble, by which Commerce publicized its change of practice from treating the subcontractor as producer to treating the contractor as producer. *See Proposed Rules, 61 Fed. Reg. at 7330, 7381; see also Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan*, 61 Fed. Reg. 14,064, 14,070 (March 29, 1996).[5] Proposed regulation 19 C.F.R. § 351.401(h) states: "The Secretary will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." *Proposed Rules*, 61 Fed. Reg. at 7381. The preamble states:

New paragraph (h) deals with the Department's treatment of subprocessors or

> "tollers." Several commentators expressed support for the Department's recent decision that tolling operations (*i.e.*, sub-

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[4] 19 U.S.C. § 1677(28) (1994) simply defines "producer" as "the producer of the subject merchandise."

[5] Because the investigation of this matter began by petition filed in May, 1997, which is after January 1, 1995, but prior to June 18, 1997, the applicability date of 19 C.F.R. part 351, this Court will treat the proposed regulation and preamble as a "restatement of the Department's interpretation of the requirements of the Act as amended by the [Uruguay Round Agreements Act]." 19 C.F.R. § 351.701 (1998). Although the regulation is not directly applicable to the instant investigation and this Court will not strictly construe its language and terms, it does "provide guidance." *See Brass Sheet and Strip From the Netherlands: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 51,449, 51,451 (Oct. 1, 1997).

> contractors) should not be treated as manufacturers or producers of the subject merchandise. The Department concurs with those commentators who urged that, because this policy has not been widely publicized, that it be enunciated in the regulations. Under paragraph (h), where a party owning the components of subject merchandise has a subcontractor manufacture or assemble that merchandise for a fee, the Department will consider the owner to be the manufacturer, because that party has ultimate control over how the merchandise is produced and the manner in which it is *ultimately* sold. The Department will not consider the subcontractor to be the manufacturer or producer, regardless of the proportion of production attributable to the subcontracted operation or the location of the subcontractor or owner of the goods.

Id. at 7330 (emphasis added).

Commerce's construction of "producer," as memorialized in the proposed regulation and preamble, emphasizes three factors: (1) ownership of the subject merchandise; (2) control of the relevant sale of the subject merchandise; and (3) control of production of the subject merchandise. To determine whether Commerce's consideration of these factors is reasonable, this Court remanded the matter to Commerce to clarify its reason for choosing the sale by the design house as the "relevant sale." *See Taiwan Semiconductor*, 100 F. Supp. 2d at 1122.

Commerce's *Remand Response* defines "relevant sale" as "the first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *Remand Response* at 7–8. Because such a company's "pricing represents all relevant elements of value," it "functions as the 'price setter' or potential price discriminator" and is therefore the producer of the merchandise. *Id.* at 8.

Commerce's use of "relevant sale" to interpret "producer" is a reasonable construction of the statute because it furthers congressional intent for Commerce to determine whether subject merchandise is being, or is likely to be, sold in the United States at less than its fair value. *See* 19 U.S.C. § 1673d(a)(1) (1994). In order to make a less-than-fair-value determination, Commerce must first determine the exporter or producer of the subject merchandise who controls the export price (or constructed export price) that Commerce compares to normal values to determine dumping margins. *See* 19 U.S.C. § 1677f-1(c)(1) (1994). This Court agrees with Commerce that its interpretation of "producer" is consistent with section 772(a) and (b) of the Tariff Act of 1930, as amended, which defines "export price" and "constructed export price" as the price at which the subject merchandise is first sold (or agreed to be sold) by the producer or exporter of such merchandise to an unaffiliated purchaser in, or for exportation to, the United States. TSMC, in claiming an arm's length establishment of subject merchandise's price is the "only legal requirement for the use of sales in calculating dumping," ignores Commerce's need

to determine the identity of the producer making the sale. (Pl.'s Resp. to Remand at 8.)

Neither will this Court label Commerce's "pass through" analysis unreasonable simply because TSMC claims its application too complex for future investigations. The elaborate analysis rejected by the Court of Appeals for the Federal Circuit in *Daewoo Electronics Co. v. International Union*, 6 F.3d 1511, 1518 (Fed Cir. 1993) is readily distinguishable. There, the lower court had rejected Commerce's reasonable use of the accounting method, requiring instead a more complicated econometric analysis of taxes passed through to home market consumers. Here, the Court does not impose a preferred definition of "relevant sale" upon Commerce that thwarts Commerce's reasonable consideration of control of all relevant elements of value to determine producer status. This Court will not decide the hypothetical cases raised by TSMC.

TSMC has also failed to persuade this Court that Commerce has unreasonably departed from case precedent. The cases it cites regarding custom-made products are inapposite.[6]

TSMC claims Commerce's definition of relevant sale renders the regulation nugatory because, as the subcontractor cannot control the downstream sale by its purchaser, the subcontractor can never qualify as producer. Commerce, however, does not require the subcontractor to control the downstream sales of its customers. Its requirement of control over all elements of value simply means here that the subcontractor's customer who owns the design, rather than the subcontractor, controls all relevant elements of value.

TSMC also claims Commerce did not respond to the Court's request for clarification under the statute and existing practice. This Court has already noted an absence of administrative and judicial precedent interpreting Commerce's practice under the statute. *See Taiwan Semiconductor*, 100 F. Supp. 2d at 1123. Commerce's remand response has, however, through its further development of Commerce's reasoning behind the proposed regulation, adequately demonstrated its interpretation of "relevant sale" is a reasonable construction of "producer."

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[6] TSMC attempts to support its claim that Commerce "routinely has granted manufacturer status to, and calculated individual margins for, producers that manufactured and sold custom-made products based on customer-provided designs and/or specifications" by citing to the following: *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et. al.*, 64 Fed. Reg. 35,590 (July 1, 1999) (lists custom-made specialty bearings under "products covered" with no discussion of whether bearing designer or bearing manufacturer should be considered the respondent); *Engineered Process Gas Turbo-Compressor Systems Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan*, 62 Fed. Reg. 24,394, 24,406 (May 5, 1997) (in discussion of level of trade adjustment, "technical specification development" listed as U.S. selling expense in transaction between affiliated parties); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.*, 62 Fed Reg. 2081 (Jan. 15, 1997) (lists custom-made specialty bearings under "products covered" with no discussion of whether bearing designer or bearing manufacturer should be considered the respondent); *Certain Corrosion Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 61 Fed. Reg. 51,891 (Oct. 4, 1996) (Canadian manufacturer's sales of custom-made products to end users and steel service centers a substantially similar selling activity warranting no level of trade adjustment); *Mechanical Transfer Presses from Japan*, 62 Fed. Reg. 11,820 (March 13, 1997) (discusses need for cost test on sale-by-sale basis for unique custom-built capital equipment); *Large Power Transformers from Japan*, 56 Fed. Reg. 29,215 (June 26, 1991) (pre-dates change of tolling practice). (Response of Taiwan Semiconductor Manufacturing Company, Ltd. to the Remand Views Submitted by the U.S. Department of Commerce to the Court on June 30, 2000 at 16 (Pl.'s Resp. to Remand).) Of the cases decided after the proposed regulation, none revolve around the issue of producer identity.

Ownership and control of production of the subject merchandise, the other two components emphasized by the proposed regulation and preamble, also constitute a reasonable construction of "producer." In considering ownership, Commerce reasonably considers whether a party owns the components of the subject merchandise. The preamble states: "Where a party *owning the components* of the subject merchandise has a subcontractor manufacture or assemble that merchandise for a fee, the Department will consider the owner to be the manufacturer . . . ." 61 Fed. Reg at 7330 (emphasis added). TSMC focuses only upon the language of proposed regulation 19 C.F.R. § 351.401(h) to argue that ownership of the subject merchandise automatically renders a subcontractor a producer. *See Proposed Rules*, 61 Fed. Reg. at 7381 ("The Secretary will not consider a . . . subcontractor to be a . . . producer where the . . . subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise . . . ."). This Court finds Commerce has reasonably considered ownership of the components of the subject merchandise as a factor in its construction of "producer." Control of production of the subject merchandise, the other factor emphasized by the proposed regulation and preamble, also constitutes a reasonable construction of "producer."

B. *Commerce's determination is supported by substantial evidence on the record.*

Commerce's determination that TSMC is not a producer of the subject merchandise is supported by substantial evidence on the record showing that TSMC does not own, control the relevant sale of, or control production of, the subject merchandise. TSMC's non-ownership of the wafer design constitutes the determinative factor in Commerce's and this Court's analysis.

First, TSMC's non-ownership of the design negates its claim of ownership of the subject merchandise. On its face, TSMC appears to own the subject merchandise because it holds title to the wafers sold to the design house.[7] Commerce, however, correctly notes that although TSMC delivers to the design house a product with all the characteristics of the subject merchandise, its price represents only the cost of transferring another company's design into the actual product. *See Remand Response* at 5, 9. The record demonstrates the design house owns the underlying intellectual property at all stages of production; therefore, only upon TSMC's transfer to the design house does one party own all components of the subject merchandise.

Second, TSMC's non-ownership of the design means it cannot control the relevant sale of the subject merchandise. Because TSMC's price does not reflect all relevant elements of value, it cannot function as the price-setter for purposes of a dumping investigation. Sub-

[7] TSMC correctly asserts its purpose for holding title is irrelevant, despite Commerce's assumption that TSMC holds title merely to indemnify against loss.

stantial evidence on the record supports Commerce's position that, "in an industry that is shaped by intellectual property considerations[,] . . . design is one of the primary determinants of the value of individual products." *Id.* at 11. In its Foundry Elimination Memorandum, Commerce quotes United Microelectronics Corporation, a foundry with processes similar to those of TSMC:

> In the foundry business, UMC starts with blank wafers, and processes them in foundry operations according to instructions and using designs created, owned and provided by a design house or customer. These designs determine the type, function and features of the resulting integrated circuit or IC. [The foundry] simply performs foundry operations (*i.e.*, depositing layers, forming patterns, etching, implanting into and treating the wafers) to produce a finished wafer incorporating the customer's specific designs.

(Foundry Elimination Memorandum at 7–8.) Because TSMC "normally sells its . . . SRAM . . . processed wafers to customers who supply their own designs," TSMC's customers control the relevant sale of the subject merchandise. (Response of Taiwan Semiconductor Manufacturing Company Ltd. of May 14, 1997 to Section A of Commerce's Questionnaire, Pub. Doc. 131 (excerpts), Pl. Pub. Exh. 2, at A-1.)

Finally, by owning the design, the design house controls production of the subject merchandise. From information provided by respondents, Commerce concluded "the entity controlling the wafer design in effect controls production in the SRAMs industry" because the design house: (1) produces, or arranges and pays for the production of, the design mask; (2) retains ownership of the design and design mask at all stages of production; (3) subcontracts production with a foundry, telling the foundry what and how much to make; and (4) arranges for subsequent steps in the production process after taking possession of the processed wafers. (Foundry Elimination Memorandum at 9.)

C. *Commerce's decision not to verify the information submitted by TSMC is supported by substantial evidence and otherwise in accordance with law.*[8]

Because TSMC is not a producer and thus cannot be a respondent, Commerce should not be required to verify the information submitted by TSMC. Although 19 U.S.C. § 1677m(i)(1994) states Commerce "shall verify all information relied upon in making . . . a final determination in an investigation" and this is echoed by the implementing regulation applicable at the time,[9] a subsequent provision of the regulation states:

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[8] The parties arguments regarding verification and procedural fairness are summarized in *Taiwan Semiconductor*, 100 F.Supp. 2d at 1115, 1116, 1118.

[9] "The Secretary will verify all factual information the Secretary relies on in [a] final determination . . . ." 19 C.F.R. § 353.36(a)(1)(i)(1997).

> If the Secretary decides that, because of the large number of producers and resellers included in an investigation or administrative review, it is impractical to verify relevant factual information for each person, the Secretary may select and verify a sample.

19 C.F.R. § 353.36(a)(2). Requiring verification would defeat the legislative intent behind 19 U.S.C. § 1677f-1(c)(2) (1994), which allows Commerce to limit the number of mandatory respondents when an investigation involves an unmanageable number of producers. Verification of information from each potential respondent would undermine statutory and regulatory concern for conservation of scarce administrative resources. (Defendant's Opposition to Motion for Judgment on Agency Record at 51–52.)

Furthermore, verification would not change TSMC's status. This Court has found substantial evidence on the record to support Commerce's determination to exclude TSMC as a mandatory respondent. Were Commerce to resolve the factual discrepancies alleged by TSMC in TSMC's favor, the foundry would remain a non-producer. Commerce's decision not to verify the information submitted by TSMC is supported by substantial evidence and otherwise in accordance with law.

D. *Commerce did not violate legal rules of procedural fairness.*

Commerce did not violate legal rules of procedural fairness when its *Preliminary Determination* announced Commerce would no longer consider TSMC a mandatory respondent despite contradicting Commerce's earlier statement that TSMC would be a mandatory respondent throughout the investigation. (Respondent Selection Memorandum at 2 n.3.) In reviewing an agency's change of position, the Court will consider whether the action was arbitrary. *See Cultivos Miramonte S.A. v. United States*, 980 F.Supp. 1268, 1274, n.7 (Ct. Int'l Trade, 1997).

Commerce's action was not arbitrary. The context within which it named TSMC a mandatory respondent also indicated the need to resolve a double counting discrepancy. Commerce warned that indirect sales to the United States by TSMC could instead be analyzed as direct sales to the United States by TSMC's design house customers. (Memorandum of May 21, 1997, from the Team to Louis Apple, Acting Director, Import Admin., Confidential Def. Exh. 1 at 2 n.3.) As explained in the Foundry Elimination Memorandum, Commerce originally believed TSMC "had a sufficient volume of sales to the United States to select [it] as [a respondent] independent of any finding related to [its] foundry business." (Foundry Elimination Memorandum at 2 n.4). Subsequent review of TSMC's responses, however, indicated no non-foundry-related sales by TSMC during the period of investigation. *Id.*

In order to reach an accurate conclusion in the final determination, therefore, Commerce could no longer treat TSMC as a mandatory respondent. Through the *Preliminary Determination* Commerce gave

TSMC adequate opportunity to comment on its decision. Commerce did not arbitrarily change its position in excluding TSMC as a mandatory respondent.

CONCLUSION

Upon Plaintiff's challenge to Commerce's exclusion of TSMC as a producer in the *Final Determination*, as amended by the *Amended Final Determination* and *Remand Response*, and upon the opposition to Defendant and Defendant-Intervenor thereto, the *Final Determination* of Commerce, as amended by the *Amended Final Determination* and *Remand Response*, is sustained in all respects. Plaintiff's motion for stay of further proceedings is denied.

(Slip Op. 01–40)

SONY ELECTRONICS INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT
ARBON STEEL & SERVICE CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–10–02987

[Plaintiffs' combined motion for reassignment of the instant actions to a Three-Judge Panel is denied.]

(Dated April 5, 2001)

Galvin & Mlawski (*John J. Galvin*), New York, New York, for Plaintiffs.
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OPINION

CARMAN, *Chief Judge*: This matter arises from the combined motion of Plaintiffs Sony Electronics Inc. ("Sony") and Arbon Steel & Service Co., Inc. ("Arbon") for an order reassigning this action to a three-judge panel pursuant to 28 U.S.C. §§ 253(c) and 255(a) (1994) and Rule 77(e)(2) of the Rules of this Court. Defendant, United States, opposes the motion.

Plaintiffs both seek refunds of the Harbor Maintenance Tax ("HMT") paid on their respective vessel cargo exports. However, the two cases come before the Court under different jurisdictional bases. On October 23, 1995, Sony protested Customs' refusal to refund the HMT

imposed under 26 U.S.C. § 4461(c)(1)(B) on its vessel cargo exports for the 2nd, 3rd and 4th quarters of 1990 and the 1st and 4th quarters of 1991 and 1992, inclusive. Pursuant to 19 U.S.C. § 1515(b) and 19 C.F.R. § 174.22(d), Sony's protest was deemed denied on January 4, 1998. The instant action was timely filed with this Court on June 29, 1998. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a). *See Swisher Int'l, Inc. v. United States*, 205 F.3d 1358, 1364 (Fed. Cir. 2000) (holding that HMT plaintiffs may bring an action under 1581(a)).

Arbon commenced its action with the filing of a summons and complaint on October 9, 1998. Arbon's action involves a demand for refund of the HMT paid on its vessel cargo exports for the 4th quarter of 1995 through the 3rd quarter of 1997, inclusive. Arbon subsequently abandoned its claim for refund of its HMT export payment for the 1st quarter of 1997. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i). *See United States v. United States Shoe Corp.* ("*U.S. Shoe*"), 523 U.S. 360, 366 (1998) (finding that CIT jurisdiction over controversies regarding the administration and enforcement of the HMT properly resides with § 1581(i)(4)).

In *U.S. Shoe*, a unanimous Supreme Court held the HMT, as applied to exports, unconstitutionally violated the Export Clause. 523 U.S. at 369. Pursuant to the Supreme Court's decision, Plaintiffs are entitled to a full refund of all HMT imposed under 26 U.S.C. § 4461(c)(1)(B) on their respective vessel cargo exports. Plaintiffs submit, however, that the United States is also required to pay prejudgment interest on the total amount of refunds due. Plaintiffs base their request for a three-judge panel on the grounds that the Government's refusal to pay prejudgment interest on the HMT refunds due violates several provisions of the United States Constitution.

Defendant opposes the motion, urging Plaintiffs have made no showing to justify appointment of a three-judge panel. Defendant contends Plaintiffs' motion neither raises important constitutional issues, nor is its resolution likely to have broad or significant implications in the administration or interpretation of the customs laws.

DISCUSSION

The authority of the chief judge of this Court to designate a three-judge panel to hear and determine a case is granted under 28 U.S.C. §§ 253(c) and 255(a).

Section 253(c) of Title 28 provides:

> The chief judge, under rules of the court, may designate any judge or judges of the court to try any case and, when the circumstances so warrant, reassign the case to another judge or judges.

28 U.S.C. § 253(c).

Section 255(a) of Title 28 provides in pertinent part:

> (a) Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Court of International Trade shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, . . . or (2) has broad or significant implications in the administration or interpretation of the customs laws.

28 U.S.C. § 255(a).

Rule 77(e)(2) of the Rules of this Court implement these statutory provisions in pertinent part:

> (2) Assignment to Three-Judge Panel. An action may be assigned by the chief judge to a three-judge panel either upon motion, or upon the chief judge's own initiative, when the chief judge finds that the action raises an issue of the constitutionality of an Act of Congress, . . . or has broad or significant implications in the administration or interpretation of the law.

USCIT Rule 77(e)(2).

Title 28 U.S.C. § 255, however, does not obligate the chief judge to assign a three-judge panel. Rather, decisions concerning the appointment of a three-judge panel fall within the sound discretion of the chief judge. *See Cemex, S.A. v. United States*, 765 F. Supp. 745, 748 (Ct. Int'l Trade 1991); *Fundicao Tupy, S.A. v. United States*, 652 F. Supp. 1538, 1540–41 (Ct. Int'l Trade 1987); *Metallverken Nederland B.V. v. United States*, 1989 WL 113686 (Ct. Int'l Trade Sept. 26, 1989), *quoting Seattle Marine Fishing Supply Co. v. United States*, 709 F. Supp. 226, 228 (Ct. Int'l Trade 1989). In exercising this discretion, the chief judge must find that the issues presented satisfy either of the two statutory criterion set forth in 28 U.S.C. § 255(a). *Cemex*, 765 F. Supp. at 748; *Washington Int'l Ins. Co. v. United States*, 659 F. Supp. 235, 236 (Ct. Int'l Trade 1987) (citing *Fundicao*, 652 F. Supp. at 1541). In addition, the plaintiff must demonstrate "facts which would warrant a finding that the action presents a question of such an exceptional nature as to require the designation of a three-judge panel." *Barnhart v. United States*, 563 F. Supp. 1387, 1390 (Ct. Int'l Trade 1983). Finally, the legislative history of 28 U.S.C. § 255 makes clear that the chief judge must also "consider whether the benefits and advantages of a decision by a three-judge panel outweigh the benefits derived from the 'more efficient utilization of judicial resources' provided by a single judge." *Fundicao*, 652 F. Supp. at 1541, *quoting* H.R.REP. No. 1067, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 3188, 3200.

Initially, the Court notes Plaintiffs never address the statutory criteria of § 255(a) granting the chief judge the authority to assign the cases to a three-judge panel. Nowhere do they demonstrate how their claims meet this statutory standard, instead leaving it to the Court to

formulate their arguments for them. Despite Plaintiffs' failure to address the criteria, Plaintiffs' arguments appear tailored to § 255(a)(1), which requires that the action raise an issue of the constitutionality of an Act of Congress.

The United States has refused to pay prejudgment interest in the HMT cases based on the traditional rule enunciated in *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), where the Supreme Court held that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." Plaintiffs allege that several "constitutional requirements" embodied in the Fifth and Tenth Amendments, as well as the Export Clause, preclude application of the "traditional rule" of sovereign immunity from prejudgment interest. Plaintiffs make four alternative claims regarding their position that the Government is precluded from claiming sovereign immunity.

First, citing *North Am. Co. v. SEC*, 327 U.S. 686, 704–5 (1946), Plaintiffs claim the Federal Government is not an absolute sovereign. Plaintiffs contend that when the Export Clause and Import-Export Clause are read in conjunction with the Tenth Amendment, it is clear that the power to tax exports is reserved to the people of the United States. Therefore, the Government exercised a power that was not within its sovereign authority when it taxed exports under the HMT. Accordingly, Plaintiffs argue that because the Government was not acting within its sovereign power when it taxed the exports, it cannot now claim to have sovereign immunity from prejudgment interest liability.

Second, Plaintiffs contend that even if their first argument fails, the "constitutional requirement" of just compensation embodied in the Takings Clause of the Fifth Amendment precludes application of the traditional rule regarding immunity from interest.

Third, Plaintiffs argue that should the Takings Clause be inapplicable to the present case, the Due Process Clause of the Fifth Amendment precludes the Government from claiming immunity from interest payments because the taxes paid on the exports constitute a deprivation of property that requires just compensation.

Finally, Plaintiffs submit that the interest earned in the Harbor Maintenance Trust Fund on the HMTs at issue is property, just as the taxes themselves are property. Plaintiff cites the Supreme Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, for the proposition that the "earnings of a fund are incidents of ownership . . . and are property just as the fund itself is property." 449 U.S. 155, 164 (1980). Thus, the Government's retention of the earnings realized on the HMT are an attempt to raise federal revenue from exports and, although not directly imposed on the goods being exported, are, in effect, a prohibited tax on exports.

Defendant contends Plaintiffs' motion does not challenge the constitutionality of an Act of Congress, but merely involves general con-

stitutional challenges to the United States' refusal to pay interest. Defendant contends Plaintiffs' failure to directly address the constitutionality of an Act of Congress mandates denial of the motion. Additionally, Defendant argues that even if Plaintiffs had sufficiently challenged the constitutionality of an Act of Congress, Plaintiffs fail to demonstrate that the benefits of a three-judge panel would outweigh the more efficient use of judicial resources provided by a single judge.

For the reasons set forth below, the Court agrees with Defendant.

A. *Constitutionality of an Act of Congress – 28 U.S.C. § 255(a)(1)*

The Court finds Plaintiffs have failed to demonstrate how the Government's refusal to pay prejudgment interest on the HMT refunds directly addresses the "constitutionality of an Act of Congress" as required by 28 U.S.C. § 255(a)(1). No statutes are being challenged as unconstitutional in this case. Rather, Plaintiffs simply contend that denial of interest would violate several provisions of the Constitution. As this Court has stated, "[a]llegations of unconstitutionality, in and of themselves, are insufficient to bring an action within the confines of the section 255 exception to the single-judge trial standard." *Barnhart*, 563 F. Supp. at 1391 (citing *Erie Navigation Co. v. United States*, 475 F. Supp. 160 (Cust. Ct. 1979)). The party seeking the three-judge panel bears the burden of establishing facts which would warrant a finding that the action presents a question of such an *exceptional* nature as to require the designation of a three-judge court. *Id.* at 1390 (emphasis added). Plaintiffs have not satisfied that burden.

Even were the Court convinced that the constitutionality of an Act of Congress were at issue, the fact that the issue of prejudgment interest has been raised in a prior test case supports the Court's determination to deny Plaintiffs' motion. *See International Business Machines Corp. ("IBM") v. United States*, 201 F.3d 1367 (Fed. Cir. 2000). A short history of the relevant proceedings relating to prejudgment interest in the HMT cases is helpful in demonstrating that Plaintiffs' arguments are unpersuasive and fail to show these issues are of an exceptional nature.

After the Supreme Court decided *U.S. Shoe*, all parties involved in HMT litigation had an opportunity to submit briefs concerning the procedures necessary to implement the refunds of the HMT exacted on exports. After considering all recommendations, on May 20, 1998, the Court issued an order directing that "the United States shall select an appropriate case for the entry of judgment with interest, shall notify plaintiff in that case, and shall submit a proposed judgment form to the court by" June 1. *United States Shoe Corp. v. United States*, 1998 WL 272982, at *1 (Ct. Int'l Trade May 20, 1998). *IBM v. United States*, Court No. 94–10–00625, was subsequently designated as the test case for the award of interest in § 1581(i) cases. As noted earlier, Arbon is before this Court under § 1581(i) jurisdiction. On June 17, 1998, the Court entered judgment in *IBM* for the plaintiff, ordered payment of $330,689.00 in principal, and found that 28 U.S.C.

§ 2411 entitled the HMT plaintiffs to interest. *See IBM v. United States*, 1998 WL 325156, at *1 (Ct. Int'l Trade June 17, 1998). The Court also stayed the payment obligation as to interest "until the time for appeal expires or the appeal is finally resolved." *Id.*

The United States filed its notice of appeal in *IBM* on August 7, 1998. During the time *IBM* was under review by the Court of Appeals for the Federal Circuit, this Court issued a proposed plan for the resolution of claims and outstanding issues. *See United States Shoe Corp. v. United States*, 1998 WL 419353 (Ct. Int'l Trade July 23, 1998). The Court specifically stated that "[i]f there remain any non-export issues for which a test case is not now proceeding, a plaintiff who wishes its case to proceed as a test case on such issue shall so advise the court in its comments on the proposed plan by August 14, 1998." *Id.* at *2. In the proposed judgment, the Court indicated that "[i]nterest shall be paid on the refunded amounts in accordance with a schedule set by the court should appellate proceedings in [*IBM*] finally resolve that interest is owing on HMT payments." *Id.* at *4. The Court also solicited comments from interested parties on the Court's proposal. No party suggested that another test case be designated regarding alleged constitutional bases for an award of interest. The only additional interest issue identified was how the award of interest, if upheld on appeal, would be calculated pursuant to the Internal Revenue Code. (Unrebutted assertion set forth in United States' Response Brief at 6.)

On August 28, 1998, after considering the interested parties' proposals, the Court issued its Order Establishing Claims Resolution Procedure. *See United States Shoe Corp. v. United States*, 1998 WL 544680 (Ct. Int'l Trade Aug. 28, 1998). The Court stated:

> "[n]o other HMT test cases will be designated unless a request is received by the court within 15 days hereof for designation of a specific case on an issue not covered by a previously designated test case. The court expects attorneys familiar with this matter to raise all issues of general applicability which relate to HMT and which reasonably can be anticipated."

Id. at *2. The Court's proposed judgment, identifying *IBM* as the interest test case, remained unchanged. No issue relating to constitutional claims of prejudgment interest was identified within the fifteen days provided by the Court. (Unrebutted assertion set forth in United States' Response Brief at 7.)

On January 19, 2000, the Federal Circuit reversed this Court's award of interest in *IBM*. 201 F.3d 1367. Subsequently, IBM filed a combined petition for rehearing and rehearing *en banc*, in which IBM first raised its constitutional arguments at the appellate level. The Federal Circuit denied IBM's petition on June 13, 2000. IBM then filed a petition for a writ of certiorari in the United States Supreme Court on September 28, 2000. The Supreme Court denied the petition on February 20, 2001. It is true that the constitutional issues were not ad-

dressed by the Federal Circuit in *IBM*. However, the issues were fully briefed before this Court. Additionally, the Federal Circuit denied the petition for rehearing in which the constitutional issues were raised. The Court finds it highly persuasive that the Federal Circuit denied the petition for rehearing and that the Supreme Court denied the petition for a writ of certiorari.

With respect to cases claiming jurisdiction under 28 U.S.C. § 1581(a) (*i.e.* Sony), in *Swisher Int'l, Inc. v. United States*, the Federal Circuit reversed this Court, holding that the Supreme Court's decision in *U.S. Shoe* did not preclude the Court from considering the cases of HMT plaintiffs brought under the auspices of 1581(a) jurisdiction where a refund request and protest were, in turn, filed and denied. 205 F.3d at 1364. On March 13, 2001, upon remand, the Court issued an order requiring the immediate refund of HMT on exports, plus interest pursuant to 28 U.S.C. § 2644 for *Swisher*-type cases. *See Swisher Int'l, Inc. v. United States*, 2001 WL 261562, at *1 (Ct. Int'l Trade Mar. 13, 2001). The order also designates *Swisher Int'l, Inc. v. United States*, Court No. 95–03–00322, as a test case to adjudicate the issue of whether pre-summons interest accrues on HMT refunds in *Swisher*-type cases. *See id.*, at *3.

Because the interest issue has already been litigated with respect to § 1581(i) cases in *IBM*, and *Swisher* has been designated a test case for interest in § 1581(a) cases, the chief judge finds the issues presented by Plaintiffs' cases are not of an exceptional nature. This, coupled with Plaintiffs' failure to raise an issue of the constitutionality of an Act of Congress leads the chief judge to conclude Plaintiffs do not meet the burden of proof required to reassign these cases under the first prong of § 255(a).

B. *Broad or Significant Implications – 28 U.S.C. § 255(a)(2)*

Plaintiffs do not allege that the requirements of the second prong of § 255(a) have been met. Nonetheless, the Court is required to consider the second prong in its analysis. The Court finds Plaintiffs arguments fail under § 255(a)(2) for the same reasons as addressed *supra*, Section A. Plaintiffs have not demonstrated that this case has broad or significant implications in the administration or interpretation of the customs laws as required by 28 U.S.C. § 255(a)(2).

C. *Benefits of Three-Judge Panel vs. Efficient Use of Judicial Resources*

In addition to the two statutory criteria of § 255(a), the chief judge is required to determine whether the benefits and advantages of a three-judge panel outweigh the benefits derived from the more efficient utilization of judicial resources provided by a single judge. *Fundicao*, 652 F. Supp. at 1541.

By order of assignment dated December 5, 1995, all cases filed with the Court of International Trade subsequent to the order in which the constitutionality of the HMT was challenged were to be assigned to the Honorable Jane A. Restani, Judge. The two present cases fall

into this category and were assigned to Judge Restani immediately upon filing. In *National Corn Growers Ass'n v. Baker*, 643 F. Supp. 626 (1986), the chief judge noted that:

> [F]or reasons of judicial economy and efficiency, the authority to reassign should be used sparingly. Indeed, it may be stated that motions for reassignment to a three-judge panel, made after the case has been assigned to a single judge, will be viewed with disfavor . . . .

643 F. Supp. at 631.

Judge Restani has been involved in the large quantity of litigation surrounding the challenges to the constitutionality of the HMT as applied to exports since its commencement in 1994. She was a member of the three-judge panel declaring the HMT unconstitutional as applied to exports, which decision was subsequently affirmed by the Federal Circuit and the Supreme Court. She also was involved in the challenges to the Government's refusal to pay interest in *IBM*, and is currently involved in the process to designate *Swisher* as the interest test case under § 1581(a). Judge Restani is intimately familiar with the complex procedural history of the HMT litigation. Plaintiffs have not shown the Court that reassigning these cases to a three-judge panel would provide benefits or advantages that clearly "outweigh the benefits derived from the 'more efficient utilization of judicial resources provided' by a single judge", in this case, Judge Restani. *Fundicao*, 652 F. Supp. at 1541 (quoting H.R.REP. NO. 1067, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 3188, 3200).

CONCLUSION

On the facts presented, without expressing any view as to the merits of the litigation, it is the conclusion of the chief judge that this action neither raises an issue of the constitutionality of an Act of Congress, nor has broad or significant implications in the administration or interpretation of the customs law within the meaning of 28 U.S.C. § 255(a) to warrant reassignment to a three-judge panel. Further, the chief judge finds that the benefits and advantages of the designation of a three-judge panel do not outweigh the benefits derived from the more efficient utilization of judicial resources provided by a single judge.

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